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COMMENTARIES

ON THE

JURISDICTION, PRACTICE,

AND

PECULIAR JURISPRUDENCE

OF THE

COURTS OF THE UNITED STATES.

VOL. I.

CONTAINING A VIEW OF THE JUDICIAL POWER, AND THE JURIS-
DICTION AND PRACTICE OF THE SUPREME COURT OF
THE UNITED STATES.

BY

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PREFACE.

THE purpose of this work is sufficiently indicated by its title.

The present volume contains a view of the Judicial Power of the United States, and an exhibition of the Jurisdiction and Practice of the Supreme Court. It seemed the natural order of the subject to commence with the highest tribunal known to the Constitution. But, independent of this consideration, I have observed, in a constant attendance and some practice in the Supreme Court of the United States, that a more extended knowledge, on the part of the profession, of the principles which regulate its jurisdiction and modes of procedure, is greatly to be desired.

If the labors of the Court, or those of the Bar, shall be facilitated in any degree by these Commem-

taries, I shall have gained—what should be the first object with every juridical writer—a consciousness of having advanced the interests of Jurisprudence. Constitutional Law is well understood by comparatively few members of the profession; and I cannot but persuade myself that any well-meant efforts for its cultivation will be received with kindness.

The second volume of this work will embrace the Jurisdiction and Practice of the Circuit and District Courts.

BOSTON, August, 1854.

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COMMENTARIES.

BOOK I.

THE JUDICIAL POWER OF THE UNITED STATES.

CHAPTER I.

CASES ARISING UNDER THE CONSTITUTION, LAWS, AND TREATIES.

§ 1. THE third Article of the Constitution of the United States, and the seventh and eleventh of the Amendments, contain the provisions by which the Judicial Power of the Union is defined. They declare as follows :

SEC. 1. "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

SEC. 2. "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ; to all cases affecting ambassadors, other public ministers, and consuls ; to all cases of admiralty and maritime jurisdiction ; to controversies to which the United States shall be a party ; to controversies

between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make. The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."¹ "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law."² "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state."³

§ 2. The Judicial Power of the United States is the principal means by which the Constitution is made adequate to its own purposes. The people of the United States, "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity," conferred certain powers upon the general government, and imposed certain restrictions and limitations upon the powers of the states.

¹ Art. 3.

² 7th Amendment.

³ 11th Amendment.

That these powers and these restrictions might retain their just supremacy over the constitutions and laws of the states, the Constitution of the United States was made the supreme law of the land. This supremacy might have been left to be enforced by arms; but in order to avoid this recourse, the structure and functions of the judicial power were devised and incorporated into the Constitution.

§ 3. The extent of the judicial power, its nature and objects, can be appreciated only after an enumeration and survey of the various topics comprehended by the clauses of the Constitution by which it is established. A cursory reading of those clauses informs us that there are three principal classes of subjects embraced by them. Into one of these classes fall all judicial controversies, in which the subject-matter bears a certain character; in the second are included all judicial controversies in which the parties, one or both, sustain a certain character or relation, without reference to the subject-matter on which the controversy arises. In the third, which is a mixed class of cases, jurisdiction seems to have reference both to the nature of the controversy and the character of the parties.

In the first of these classes are comprehended all cases in law and equity arising under the Constitution, the laws, or the treaties of the United States, and all cases of admiralty and maritime jurisdiction. These are obviously embraced within the judicial power of the United States, without reference to the character of the parties. On the other hand, controversies to which the United States may be a party, controversies between two or more states, [between a state and citizens of another state,] between citizens of different states, and between a state or the citizens thereof and foreign states, [citizens or subjects,] are comprehended within the second class, without reference to the nature or character of the controversy itself. In the third class fall the cases between citizens of the same state claiming lands under grants of different states, and the

cases affecting ambassadors, other public ministers, and consuls.

§ 4. The Constitution, however, strictly considered, establishes five different classes of cases, as the objects of the judicial power; for although the judicial power is susceptible of division into two general branches, one depending on the character of the cause, and the other on the character of the parties, yet the former comprehends three different descriptions of cases. Cases of admiralty and maritime jurisdiction are not cases arising technically under the Constitution and laws of the United States. They are a distinct class of controversies, which existed before the Constitution, arising under a system of law of great antiquity, which is to be applied to them by the courts as they occur; and the jurisdiction in these cases is conferred by a grant separate and distinct from the other objects of the jurisdiction embraced within the same clause.¹ So, too, the controversies between citizens of the same state claiming lands under grants of different states, are a special class of cases, of a distinct character, which, for reasons of high policy, were included within the judicial power.

§ 5. The Judicial Power of the United States, therefore, extends to

I. Cases in law and equity arising under the Constitution, Laws, and Treaties of the United States.

II. Cases *affecting* ambassadors, other public ministers, and consuls.

III. Cases of admiralty and maritime jurisdiction.

IV. Cases between citizens of the same state claiming lands under grants of different states.

V. Cases where the parties bear a certain character.

§ 6. It will be my design, in this volume, first, to develop these different classes of cases, in the order in which they

¹ The American Insurance Company v. Canter, 1 Peters, 511, 545.

are mentioned in the Constitution, and with reference to the provisions of that instrument; secondly, to treat of the distribution of the judicial power, as between the supreme and the inferior tribunals; and lastly, to exhibit the Jurisdiction and Practice of the Supreme Court of the United States.

§ 7. And first, with regard to the clause of the Constitution, which extends the Judicial Power to "all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;"—the first question that occurs, is, what is meant by "a case"? A case arises, within the meaning of the Constitution, whenever any question respecting the Constitution, laws, or treaties of the United States has assumed such a form, that the judicial power is capable of acting upon it. That power is capable of acting, only when the subject is submitted to it by a party, who asserts his rights in the form prescribed by law. It then becomes "a case."¹ And by "cases in *law*" arising under the Constitution, &c., are to be understood suits in which legal rights are to be ascertained and determined in contradistinction to those where equitable rights alone are recognised and equitable remedies administered, or where the proceeding is in admiralty.² By "cases in equity" are to be understood suits in which relief is sought according to the principles and practice of the equity jurisdiction as established in English jurisprudence.³

§ 8. A case is to be said to "arise" under the Constitution,

¹ Per Marshall, C. J., in *Osborn v. The Bank of the United States*, 9 Wheaton, 819.

² *Robinson v. Campbell*, 3 Wheat. 212, 221, 223; *Parsons v. Bedford*, 3 Peters, 433, 446, 447.

³ *Robinson v. Campbell*, 3 Wheat. 212; *U. S. v. Howland*, 4 Wheat. 108, 115; 1 Story's Eq. Jurisp. § 57; 3 Story's Commentaries on the Constitution, 506, 507. See further, on the distinction between "law" and "equity," *post*.

laws, or treaties of the United States, whenever the construction of either of them is involved in a correct decision. It is not necessary that a right should be asserted, which has been given by some Act of Congress passed to execute the powers of the Constitution ; or that a party should come into court to demand something conferred on him by the Constitution, or by a law. A case in law or equity consists of the right of the one party, as well as of the other, and may be truly said to arise under the Constitution, or a law of the United States, whenever its correct decision depends on the construction of either.¹

§ 9. Cases may arise under the Constitution alone, in reference to the powers conferred, the privileges granted, or the rights secured, or the prohibitions contained in that instrument, whether Congress have legislated, or are required to legislate on the particular subject or not.² Cases arise under the laws or treaties of the United States, when a question arises in a judicial proceeding, touching any right, privilege, claim, protection or defence, established by the legislation of the United States pursuant to the constitutional authority of Congress, or by a treaty entered into by the executive branch of the government ; or when the construction of any treaty or law of the United States is drawn in question. Cases also arise under the Constitution, laws, or treaties of the United States, when the validity of any statute, or authority exercised under any state is drawn in question, on the ground of its being repugnant to the Constitution, or any law or treaty of the United States.³

§ 10. We have seen that it is not necessary, in order that a case should arise under the Constitution, or a law, or a treaty of the United States, so as to bring it within the judicial power, that a party should come into court to de-

¹ Per Marshall, C. J., in *Cohens v. Virginia*, 6 Wheaton, 379.

² 3 Story's Com. on the Constitution, § 1641.

³ *Ibid.*

mand something conferred upon him by the Constitution, or by such a law or treaty. It is sufficient if there is a judicial proceeding, in which a correct decision depends upon the construction of the Constitution, or a law or treaty of the United States. Nor is a case taken out of the operation of this clause of the Constitution by the fact that questions arise in the suit, which depend upon the general principles of law, if it also involves the construction of the Constitution, or a law or treaty of the United States, or a title, right, or authority, set up under the one, or the other, or all of them. The questions, which depend upon the general principles of law, are incidental to the question which brings the case within the judicial power of the Union; for when the latter question has arisen, the very case has arisen which the Constitution contemplated, and the other questions are drawn after it, into the jurisdiction which the Constitution has established for cases that may thus arise.

§ 11. Thus, in the case of *Osborn v. The Bank of the United States* (9 Wheaton, 738, 819, 821), the question arose, whether Congress could constitutionally confer upon the Bank, created by Act of Congress, authority to sue and be sued in the courts of the United States. It was contended that several questions might arise, in such suits, depending upon the general principles of law, and not upon any Act of Congress. The Supreme Court said:—

“The question is, whether it arises under a law of the United States?

“The appellants contend that it does not, because several questions may arise in it, which depend on the general principles of the law, not on any Act of Congress.

“If this were sufficient to withdraw a case from the jurisdiction of the Federal Courts, almost every case, involving the construction of a law, would be withdrawn; and a clause in the Constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive

terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends upon the Constitution, laws, or treaties of the United States. The questions, whether the fact alleged as the foundation of the action be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions, some or all of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the court, words which seem intended to be as extensive as the Constitution, laws, and treaties of the Union; which seem designed to give the courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing. We, perceive, then, no ground on which the proposition can be maintained, that Congress is incapable of giving the Circuit Courts original jurisdiction in any case to which the appellate jurisdiction extends.

“We ask, then, if it can be sufficient to exclude this jurisdiction that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power can never be extended to a whole case, as expressed by the Constitution, but to those

parts of cases only which present the particular question involving the construction of the Constitution or the law. We say it can never be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable Congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those courts to take jurisdiction of the whole cause on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the Constitution, laws, or treaties of the United States, a trial in the Federal Courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will.

“We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

“The case of the Bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being thus constituted have a case which does not arise literally, as well as substantially, under the law?

“Take the case of a contract, which is put as the strongest against the Bank.

“When a bank sues, the first question which presents itself,

and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff, and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided for ever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The question which the case involves, then, must determine its character, whether those questions be made in the cause or not.

“The appellants say, that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled in every case to show its validity. The case arises emphatically under the law. The Act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, as its origin, is that from which every other part arises. That other questions may also arise, as the execution of the con-

tract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter.

“The clause giving the Bank a right to sue in the Circuit Courts of the United States, stands on the same principle with the acts authorizing officers of the United States who sue in their own names, to sue in the courts of the United States. The Postmaster-General, for example, cannot sue under that part of the Constitution which gives jurisdiction to the Federal Courts, in consequence of the character of the party, nor is he authorized to sue by the Judiciary Act. He comes into the courts of the Union under the authority of an Act of Congress, the constitutionality of which can only be sustained by the admission that his suit is a case arising under a law of the United States. If it be said that it is such a case, because a law of the United States authorizes the contract, and authorizes the suit, the same reasons exist with respect to a suit brought by the Bank. That, too, is such a case: because that suit, too, is itself authorized, and is brought on a contract authorized by a law of the United States. It depends absolutely on that law, and cannot exist a moment without its authority.

“If it be said, that a suit brought by the Bank may depend in fact altogether on questions unconnected with any law of the United States, it is equally true, with respect to suits brought by the Postmaster-General. The plea in bar may be payment, if the suit be brought on a bond, or non assumpsit, if it be brought on an open account, and no other question may arise than what respects the complete discharge of the demand. Yet the constitutionality of the act authorizing the Postmaster-General to sue in the courts of the United States, has never been drawn into question. It is sustained singly by an Act of Congress, standing on that construction of the Constitution which asserts the right of the Legislature to give original jurisdiction to the Circuit Courts, in cases arising under a law of the United States.

“The clause in the patent law, authorizing suits in the

Circuit Courts, stands, we think, on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an Act of Congress. He may rest his defence exclusively on the fact, that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause, cannot oust the jurisdiction of the court, or establish the position, that the case does not arise under a law of the United States.

“It is said, that a clear distinction exists between the party and the cause ; that the party may originate under a law with which the cause has no connexion ; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the courts of the United States, as give that right to the Bank.

“This distinction is not denied ; and, if the Act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the Bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which that being possesses. Every act of the Bank grows out of this law, and is tested by it. To use the language of the Constitution, every act of the Bank arises out of this law.

“A naturalized citizen is indeed made a citizen under an Act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the

same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen, except so far as the Constitution makes the distinction. The law makes none.

“There is, then, no resemblance between the act incorporating the Bank, and the general naturalization law.

“Upon the best consideration we have been able to bestow on this subject, we are of opinion, that the clause in the act of incorporation, enabling the Bank to sue in the courts of the United States, is consistent with the Constitution, and to be obeyed in all courts.”

§ 12. The illustrations presented by this discussion of the manner in which a case may arise under a law of the United States, are so ample, as to render it unnecessary here to present other examples of the same principle. The very large class of cases in which the validity of state laws is brought in question, on account of a supposed conflict with the Constitution of the United States, or with a treaty, or a law of the United States enacted in pursuance of the Constitution, will find their appropriate place in treating of the jurisdiction of the Supreme Court. But there is another class of cases, in reference to which the authority just cited presents several illustrations of the mode in which a question may arise under a law of the United States, so as to be within the scope of the judicial power.

§ 13. This class of cases involves those where a duty is imposed upon an officer of the United States, and protection becomes necessary in the discharge of his functions. If called in question for his official acts in any proceeding in a state court, the case would arise under a law of the United States, and would therefore be reached by the judicial power, because protection of the officer is necessary to the exercise of the powers of government, and such protection is implied in the legislation by which his act is authorized. “It is not unusual,” say the court, “for a legis-

lative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. This security is implied in the order itself. It is no unusual thing for an Act of Congress to imply, without expressing, this very exemption from state control, which is said to be so objectionable in this instance. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted, that all who are employed in them are protected, while in the line of duty; and yet this protection is not expressed in any Act of Congress. It is incidental to, and is implied in the several acts by which these institutions are created, and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security.”¹

§ 14. It follows necessarily from the principles which have now been stated, that the cognizance of all crimes and offences against the laws of the United States, including suits for penalties and forfeitures, belongs to the judicial power of the United States, as defined by the clause now under consideration; although the locality of the acts done may also bring some of these cases within the clause which confers admiralty and maritime jurisdiction.²

§ 15. We are now to consider the different forms of remedy and sources of jurisprudence which this clause of the Constitution embraces, by the terms “all cases in *law* and *equity*.” At the time of the adoption of the Constitution, two systems of jurisprudence, besides that peculiar to the admiralty jurisdiction and practice, were known in most of the states of the confederacy, by which the Constitution

¹ Osborn v. The Bank of the United States, 9 Wheaton, 865.

² United States v. Bevens, 3 Wheaton, 336.

was adopted. One of these was the system known in English jurisprudence as equity, in which the rights of parties were litigated upon principles and by forms of proceeding distinguished from those of the common law; and the other was a system of remedies and principles adopted from the common law of England, as far as it was applicable to the situation of the Colonies at the time of their respective settlements. It is well known historically, that the framers of the Constitution designed to embrace within the judicial power all cases of a certain character, or in which the parties might bear a certain character, whether commenced and prosecuted under the one or the other of these systems.¹ But the question arises, whether it was intended to include, under the head of "law," those proceedings only which might be instituted and conducted under the forms which the common law of England recognises, or whether this term "law" has a wider signification?

§ 16. With regard to this question, it is to be observed, that the common law of England was adopted by the founders of the American colonies to a limited extent only. The emigrants from England brought with them the general principles of the common law of that country, and adopted and put them in practice, as far as they were applicable to their situation; and as the people of each colony acted independently of the rest, in this respect, it has resulted that the common law of each of the states differs in some particulars from that of the others, and that in none of them is it wholly identical with the common law of England.² Hence it follows, that when the people of these different states, speaking through the Constitution of the United States, granted to the judicial power of the Union cognizance of all cases in "law," wherever they might arise, which should arise under the Constitution, laws, or treaties of the United

¹ The Federalist.

² Van Ness v. Packard, 2 Peters, 137, 144; Wheaton v. Peters, 8 Peters, 591; Terrett v. Taylor, 9 Cranch, 43; Town of Paulet v. Clarke, Id. 292.

States, &c., they must have had in view those suits in which a legal remedy should be pursued, according to the forms and principles of the local jurisprudence, as distinguished from those in which equitable remedies were to be administered.

§ 17. The term "common law" is not found to occur in the Constitution as originally adopted. The phrase made use of in the 3d article, is, as we have seen, cases in "law." The term "common law" is found in the 7th amendment, which declares that, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law." This difference of phraseology might seem to give rise to some question as to the meaning of the 3d article and the 7th amendment; but the Supreme Court have held that the expressions, "suits at common law," in the first clause of the amendment, and "cases in law," in the 3d article, both contemplate not merely suits which the common law recognised among its old and settled proceedings, but all suits in which legal rights were to be ascertained and determined in contradistinction to those of equity, or of admiralty jurisdiction. But they have also held, that the other clause of the amendment is a substantial and independent provision, prohibiting the courts of the United States from re-examining any fact once tried by a jury, excepting in the modes and upon the rules known to the common law.¹

¹ *Parsons v. Bedford*, 3 Peters, 433, 446. Mr. Justice Story, delivering the opinion of the court, said:—

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in, every State Constitution of the Union; and it is found in the Constitution of Louisiana. One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Consti-

§ 18. The proceedings, therefore, which are contemplated by the description of "cases in law," being all suits origi-

tution was adopted, this right was secured by the seventh amendment of the Constitution proposed by Congress, and which received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares, that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law.' At this time, there were no states in the Union, the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no states were contemplated, in which it would not exist. The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The Constitution had declared, in the third article, 'That the judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority,' &c., and to all cases of admiralty and maritime jurisdiction. It is well known, that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases, to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the Constitution denominated in the third article, 'law;' not merely suits, which the common law recognised among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those where equitable rights alone were recognised, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit. Probably there were few, if any, states in the Union, in which some new legal remedies, differing from the old common law forms, were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And Congress seems to have acted with reference to this exposition in the Judiciary

nated for the purpose of ascertaining and determining legal rights in forms which are not proceedings in equity or ad-

Act of 1789, ch. 20 (which was contemporaneous with the proposal of this amendment); for in the ninth section it is provided, that 'The trial of issues in fact in the Circuit Courts shall in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury;' and again, in the thirteenth section, it is provided, that 'the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury.'

"But the other clause of the amendment is still more important; and we read it as a substantial and independent clause. 'No fact tried by a jury shall be otherwise re-examinable, in any court of the United States, than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings. The Judiciary Act of 1789, ch. 20, sec. 17, has given to all the courts of the United States 'power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.' And the appellate jurisdiction has also been amply given by the same Act (sec. 22, 24) to this court, to redress errors of law; and for such errors to award a new trial, in suits at law which have been tried by a jury.

"Was it the intention of Congress, by the general language of the Act of 1824, to alter the appellate jurisdiction of this court, and to confer on it the power of granting a new trial by a re-examination of the facts tried by the jury? to enable it, after trial by jury, to do that in respect to the courts of the United States, sitting in Louisiana, which is denied to such courts sitting in all the other states in the Union? We think not. No general words, purporting only to regulate the practice of a particular court, to conform its modes of proceeding to those prescribed by the state to its own courts, ought, in our judgment, to receive an interpretation, which would create so important an alteration in the laws of the United States, securing the trial by jury. Especially ought it not to receive such an interpretation, when there is a power given to the inferior court itself to prevent any discrepancy between the state laws and the laws of the United States; so that it would be left to its sole discretion to supersede, or to give conclusive effect in the appellate court to the verdict of the jury.

"If, indeed, the construction contended for at the bar were to be given

miralty, the next question is, what system of jurisprudence is to be applied by the courts of the United States in the adjudication of such suits?

§ 19. The precise extent to which the common law, as a system of remedy and jurisprudence, has been adopted by the Constitution of the United States, is a subject not free from difficulty. On the one hand, it is obviously true, in a certain sense, that the United States can have no common law. The federal government is established by the people of sovereign and independent states, each of which has its own local common law. The law of the United States is to be found in the Constitution and the acts of Congress passed in pursuance thereof.¹ But, inasmuch as the Constitution has given to the judicial power cognizance of various classes of suits in which legal rights are involved, when a question depending upon a common law right arises in the courts of the United States, they must look to the law of the states in which the controversy originates, or by the law of which the rights of the parties are to

to the Act of Congress, we entertain the most serious doubts, whether it would not be unconstitutional. No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the Constitution. The terms of the present act may well be satisfied by limiting its operation to modes of practice and proceeding in the court below, without changing the effect or conclusiveness of the verdict of the jury upon the facts litigated at the trial. Nor is there any inconvenience from this construction: for the party has still his remedy, by bill of exceptions, to bring the fact in review before the appellate court, so far as those facts bear upon any question of law arising at the trial; and if there be any mistake of the facts, the court below is competent to redress it by granting a new trial.

“Our opinion being that, if the evidence were now before us, it would not be competent for this court to reverse the judgment for any error in the verdict of the jury at the trial; the refusal to allow that evidence to be entered on the record is not matter of error, for which the judgment can be reversed.”

¹ *Wheaton v. Peters*, 8 Peters, 591.

be determined.¹ But the criminal jurisdiction of the courts of the United States, in the several states, has been held not to embrace offences at the common law, but only offences made such by statute.² So also, it has been held that the Circuit Courts in the several states have no power to issue a mandamus to an officer of the United States, although a mandamus is a common law process to compel the performance of an official duty.³ But, at the same time, it appears also to have been held that the authority to issue this writ is within the scope of the judicial power of the United States; that it has not been communicated to the Circuit Courts in the several states, but that it is possessed by the Circuit Court for the District of Columbia, as a court of general common law powers.⁴

§ 19 a. The 34th section of the Judiciary Act, which makes the laws of the several states rules of decision in trials at common law, in the courts of the United States, where they apply, except where the Constitution, treaties, or statutes of the United States otherwise direct, applies only to civil cases at common law, and not to criminal trials. The rules of evidence, therefore, and the rules which regulate the mode of proceeding in criminal trials in the courts of the United States, are the rules which were in force in the respective states in 1789, unaffected by any subsequent state law.⁵

§ 20. The Constitution of the United States, as we have seen, extends the judicial power to cases both "in law and equity." The distinction adopted by this expression is the same as that established in the jurisprudence of England; and under it, the Equity Jurisprudence of the courts of the

¹ *Ibid.*, Judiciary Act of 1789, § 34.

² *United States v. Hudson & Goodwin*, 7 Cranch, 32. *Same v. Cooledge*, 1 Wheaton, 415. But see the doubts expressed in the latter case.

³ *M'Intire v. Wood*, 7 Cranch, 504. *McClung v. Silliman*, 6 Wheaton, 598.

⁴ *Kendall v. The United States*, 12 Peters, 524.

⁵ *The United States v. Reid*, 12 Howard, 361.

United States embraces generally the same matters of jurisdiction and modes of remedy, which belong to the courts of equity in England, as distinguished from the cases and remedies appropriate to the courts of common law.¹

§ 21. The Judiciary Act, in its distribution of jurisdiction, recognises the same distinction between suits "at common law and in equity;"² and it declares "That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law."³ This clause has been held neither to narrow nor enlarge the equity jurisdiction of the courts of the United States, as compared with the general boundaries of Equity Jurisprudence. The Supreme Court of the United States have declared that this clause is merely declaratory, and that it makes no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity.⁴

§ 22. The purpose of the statute, therefore, is, to leave the concurrent jurisdiction of courts of equity and courts of law to be regulated by the general principles which determine the proper subjects of equitable relief in England. Thus, in cases of fraud, courts of law may afford relief; but there is a concurrent jurisdiction in courts of equity, in cases where the remedy at law is not adequate and complete for all the purposes for which the plaintiff may claim relief. Thus, a bill in equity will lie in a Circuit Court of the United States, to rescind an agreement for the sale and purchase of lands, on the ground of fraud, notwithstanding judgment has been

¹ 1 Story's Eq. Jurispr. § 57; *Robinson v. Campbell*, 3 Wheat. 212, 221, 223; *Parsons v. Bedford*, 3 Peters, 433, 447; 3 Story's Commentaries on the Constitution, &c., 506, 507; *U. S. v. Howland*, 4 Wheat. 115.

² Act of 24 Sept., 1789, § 11.

³ *Ibid.* § 16.

⁴ *Boyce's Executors v. Grundy*, 3 Peters, 210; *United States v. Howland*, 4 Wheat. 108, 115; *Bean v. Smith*, 2 Mason, 252, 270.

obtained in an action at law, against the plaintiff, for the amount agreed to be paid, and notwithstanding he might have set up the fraud in defence to that action, because the remedy was partial and might not have terminated the controversy.¹ So too, it has been held, that the Circuit Courts have concurrent jurisdiction, in equity, with courts of law, in all cases of fraud, including fraud in obtaining judgments and decrees in other courts; that there is but one exception to this, and that is, fraud in obtaining a will of real or personal estate, which is exclusively examinable in the tribunal having the jurisdiction of the probate of wills.²

§ 23. With regard to this exception, the grounds on which it rests have been somewhat narrowed by the Supreme Court of the United States. In a case where probate of a will had been fraudulently obtained, and a bill in equity was filed by the legatee under a subsequent will, alleging the fraud, and alleging that the subsequent will had been destroyed or suppressed by the defendants, and praying that effect be given to the latter will, and that the former be revoked; it was held, that although no title could be set up under the later will until it had been proved, the complainants were entitled to answers from the defendants in regard to both wills, to be used as evidence in the Court of Probate in establishing the one and revoking the other; and that if the Court of Probate should refuse to take jurisdiction, from a defect of power to bring the parties before it, lapse of time, or any other ground, it might become the duty of the Circuit Court, having the parties before it, to require them to go before the Court of Probate, and consent to the proof of the later will, and the revocation of the earlier one. It was also intimated by the court, that if this procedure should fail to procure the requisite action on both wills, perhaps the powers of a court of chancery might afford a remedy, where the right was clear, by establishing the will of later date.³

¹ *Boyce's Executors v. Grundy*, 3 Peters, 210, 215.

² *Gould v. Gould*, 3 Story, 516, 536; *Gaines and Ux. v. Chew*, 2 Howard, 619, 645.

³ *Ibid.* 619, 644.

§ 24. In another aspect of this case, also, an important question of equity jurisdiction was determined. The complainant claimed as heir-at-law, as well as legatee under the more recent will. The property of the testator had been sold under the former will to various parties, who were charged as having notice of the fraud of the executors in setting up and establishing it. In this form of procedure, the will thus fraudulently established was brought before the court collaterally, and the relief sought by the complainant did not require its revocation. If this proceeding had been between the heir-at-law and the devisee only, a court of law would have been competent to give a plain and adequate remedy; but as the functions of the executors under the fraudulent will had been long terminated, and the property, both real and personal, had passed into the hands of numerous purchasers, under various circumstances, which could be proved only by their answers, and which entered into the question of fraud, it was held, that a court of law could not give adequate relief, and that the powers of a court of equity were necessary to do complete justice between the parties.¹

§ 24 a. So, too, the courts of the United States, as courts of equity, possess jurisdiction to maintain suits in favor of legatees and distributees for their portion of an estate, notwithstanding there may be a remedy at law on the administration bond; this class of cases being of concurrent and not of exclusive jurisdiction.² In like manner, the circuit courts, as courts of equity, have concurrent jurisdiction with courts of law, in cases of dower, especially where partition, discovery, or account is prayed, and in cases of sale where the parties are willing that a sum in gross should be given in lieu of dower.³ Where the plaintiff has a remedy at law, and there is no other ground for coming into a court of equity than *discovery*, if the facts essential to the claim are exclusively within the knowledge of the defendant, he may be required to disclose them in

¹ *Gaines et Ux. v. Chew et al.*, 647 et seq.

² *Pratt v. Northam*, 5 Mason, 95. ³ *Herbert v. Wren*, 7 Cranch, 370.

a court of equity, and the court being thus rightfully in possession of the cause, will proceed to determine the whole matter; but if the defendant disclose nothing, and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, he will be left to assert his rights at law.¹ So, too, in all cases of concurrent jurisdiction, the court that first has possession of the subject must decide it; and if the question has been already decided in a court of law, it cannot be reviewed in a court of equity, without the suggestion of some equitable circumstance, of which the party could not avail himself at law.²

§ 25. The jurisdiction of courts of equity, in cases of nuisance, may be exercised at the suit of private persons, notwithstanding there is a remedy at law, where there is imminent danger of irreparable mischief before the law can act.³

§ 26. Such are some of the principal illustrations, which show that the jurisdiction of the courts of the United States, as courts of equity, is co-extensive with the general equity jurisdiction administered by other courts of equity, possessing the full chancery powers known as such in English and American jurisprudence. A statement of the outline of those powers belongs to a treatise on Equity Jurisprudence, rather than to the present work. But having considered what, in general, must be the remedy at law to deprive a party of a remedy in equity, we have now to consider in what forum such legal remedy must be found, in order to exclude the equity jurisdiction of the courts of the United States.

§ 27. The right of a party to sue in the courts of the United States, depends upon his citizenship and the citizen-

¹ *Russell v. Clark's Executors*, 7 Cranch, 69, 89.

² *Smith v. M'Iver*, 9 Wheaton, 532.

³ *City of Georgetown v. The Alexandria Canal Company*, 12 Peters, 91, 99.

ship of the opposite party, or upon the subject-matter of the controversy. The equity jurisdiction of the courts of the United States is the same in all the states, and depends upon the principles of general equity jurisprudence. It cannot, therefore, be affected by any local statute, or any local legal remedy, unless such remedy has been adopted for the courts of the United States by virtue of some Act of Congress. It has accordingly been held that the equity jurisdiction of the Circuit Court, to maintain a bill for the redemption of mortgaged premises, is not ousted by the existence of a local statute remedy at law;¹ that it is not ousted of a suit in favor of legatees or distributees for their portions of the estate of a deceased, by the existence of a local remedy at law on the administration bond;² and that a bill in equity may be maintained in the Circuit Court against the debtor of the plaintiff's debtor, notwithstanding a local statute gives a peculiar remedy to a creditor against the debtor of his debtor.³

§ 28. The test to be applied, therefore, to determine, whether a particular case falls within the equity jurisdiction of the courts of the United States, is, whether there is a plain, adequate, and complete remedy at law in the same courts.⁴

¹ *Gordon v. Hobart*, 2 Sumner, 401.

² *Pratt v. Northam*, 5 Mason, 95.

³ *United States v. Howland*, 4 Wheat. 108. As to foreign creditors of deceased persons suing in the courts of the United States, see *Williams v. Benedict*, 8 Howard, 107.

⁴ *Robinson v. Campbell*, 3 Wheaton, 212, 221. In this case, the Supreme Court of the United States, said: "By the laws of the United States, the Circuit Courts have cognizance of all suits of a civil nature at common law and in equity, in cases which fall within the limits prescribed by those laws. By the 34th section of the Judiciary Act of 1789, it is provided, that the laws of the several states, except where the Constitution, treaties, or statutes of the United States, shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. The act of May, 1792, confirms the mode of proceeding in suits at common law in the courts of the United States, and declares that the modes of pro-

§ 29. That the equity jurisdiction of the courts of the United States is the same in all the states, and that it is not affected by the existence or non-existence of an equity jurisdiction in the state tribunals, has been settled by a series of interesting decisions, which will be examined in a subsequent part of this work.¹

ceeding in suits of equity shall be, according to the principles, rules, and usages, which belong to courts of equity, as contradistinguished from courts of common law," except so far as may have been provided for by the act to establish the judicial courts of the United States. It is material to consider whether it was the intention of Congress, by these provisions, to confine the courts of the United States in their mode of administering relief to the same remedies, and those only, with all their incidents, which existed in the courts of the respective states. In other words, whether it was their intention to give the party relief in equity only, when according to such practice, a plain, adequate, and complete remedy could not be had at law. In some states in the Union, no court of chancery exists to administer equitable relief. In some of those states, courts of law recognise and enforce in suits at law, all the equitable claims and rights which a court of equity would recognise and enforce; in others all relief is denied, and such equitable claims and rights are to be considered as mere nullities at law.

"A construction, therefore, that would adopt the state practice in all its extent, would at once extinguish, in such states, the exercise of equitable jurisdiction. The Acts of Congress have distinguished between remedies at common law and in equity, yet this construction would confound them. The court, therefore, thinks, that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. Consistently with this construction, it may be admitted, that where by the statutes of a state, a title which would otherwise be deemed merely equitable, is recognised as a legal title, or a title which would be good at law is under circumstances of an equitable nature declared by such statutes to be void, the rights of the parties, in such case, may be as fully considered in a suit at law in the courts of the United States, as they would be in any state court."

¹ These cases are *Livingston v. Story*, 9 Peters, 632, 655, S. C. 13 Peters, 359, 368; *Ex parte Poultney v. The City of Lafayette*, 12 Peters, 472, 474; *Ex parte Whitney*, 13 Peters, 404; *Gains v. Relf*, 15 Peters, 9; *Gains v. Chew*, 2 Howard, 619.

§ 30. The equity jurisdiction of a court of the United States sitting in a particular district is not affected by the circumstance that lands, situated in another district, will be affected by the decree, unless the question is a naked question of title. A suit in equity by one who has the prior equity against one who has obtained the legal with notice of the equitable title, is in its nature local, and if it be a mere question of title, must be tried in the district where the land lies. But where the defendant is liable to the plaintiff in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of fraud, a court of equity has jurisdiction wherever the defendant may be found.¹

¹ *Massie v. Watts*, 6 Cranch, 148, 157. In this case, Mr. Ch. Justice Marshall, said: "This suit having been originally instituted, in the court of Kentucky, for the purpose of obtaining a conveyance for lands lying in the state of Ohio, an objection is made by the plaintiff in error, who was the defendant below, to the jurisdiction of the court by which the decree was rendered. Taking into view the character of the suit in chancery, brought to establish a prior title originating under the land law of Virginia against a person claiming under a senior patent, considering it as a substitute for a caveat introduced by the peculiar circumstances attending those titles, this court is of opinion, that there is much reason for considering it as a local action, and for confining it to the court sitting within the state in which the lands lie.

"Was this cause, therefore, to be considered as involving a naked question of title; was it, for example, a contest between Watts and Powell, the jurisdiction of the Circuit Court of Kentucky would not be sustained. But where the question changes its character; where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of mala fides practised on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction.

"In the celebrated case of *Penn v. Lord Baltimore*, the Chancellor of England decreed a specific performance of a contract respecting lands lying in North America. The objection to the jurisdiction of the court, in that case, as reported by Vezey, was not that the lands lay without the jurisdiction of the court, but that, in cases relating to boundaries between provinces, the jurisdiction was exclusively in the king and council. It is in reference to this objection, not to an objection that the

§ 30 a. The topics touched upon in this chapter, relating to the jurisprudence to be administered by the courts of the

lands were without his jurisdiction, that the Chancellor says: 'This court, therefore, has no original jurisdiction on the direct question of the original boundaries.' The reason why it had no original jurisdiction on this direct question was, that the decision on the extent of those grants, including dominion and political power, as well as property, was exclusively reserved to the king in council.

"In a subsequent part of the opinion, where he treats of the objection to the jurisdiction of the court, arising from its inability to enforce its decree in rem, he allows no weight to that argument. The strict primary decree of a court of equity is, he says, in personam, and may be enforced in all cases where the person is within its jurisdiction. In confirmation of this position, he cites the practice of the courts to decree respecting lands lying in Ireland and in the colonies, if the person, against whom the decree was prayed, be found in England. In the case of *Arglasse v. Muschamp*, 1 Vernon, 75, the defendant, residing in England, having fraudulently obtained a rent-charge on lands lying in Ireland, a bill was brought in England to set it aside. To an objection made to the jurisdiction of the court, the Chancellor replied: 'This is surely only a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the lands, and grant a sequestration to execute a decree, then they readily tell you that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that is court must agree in personam only; and when, as in this case, you prosecute the person for a fraud, they tell you that you must not intermeddle here, because the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local, and so wholly elude the jurisdiction of this court.' The Chancellor, in that case, sustained his jurisdiction on principle, and on the authority of *Archer and Preston*, in which case a contract made respecting lands in Ireland, the title to which depended on the Act of Settlement, was enforced in England, although the defendant was a resident of Ireland, and had only made a casual visit to England. On a rehearing before Lord Keeper North, this decree was affirmed.

"In the case of the *Earl of Kildare v. Sir Morrice Eustace and Fitzgerald*, 1 Vern. 419, it was determined that if the trustee live in England, the Chancellor may enforce the trust, although the lands lie in Ireland.

"In the case of *Toller v. Carteret*, 2 Vern. 494, a bill was sustained for the foreclosure of a mortgage of lands lying out of the jurisdiction of the court, the person of the mortgagor being within it.

"Subsequent to these decisions was the case of *Penn against Lord Baltimore*, 1 Vern. 444, in which the specific performance of a contract for lands lying in North America was decreed in England.

United States, present questions of great difficulty and importance, to some of which we may recur hereafter. At present, we can only remark, that as to the common law,—the 34th section of the Judiciary Act having provided that the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, where they apply,—the common and statute law of the several states is adopted as a rule of decision in civil cases.¹ As to the equity and admiralty systems of law, the question is, whether, since the Constitution confers equity and admiralty jurisdiction, those systems of jurisprudence are not to be considered as parts of the law of the United States, by adoption. The courts of the United States are to administer the equity law in each state, not because the state has such a system, but because the system of equity is, by adoption through the Constitution, made part of the law which the judicial power is to administer. This system is to be administered, not in conflict with, but supplementary to the common and statute law of the several states; as in England, or in the equity courts of the states having a chancery jurisdiction, it is administered supplementary to the common and statute law. Still, notwithstanding this limitation, and perhaps consistently with it, the very difficult question may arise, how far the common or statute law of a state may avail, to abrogate, change, or affect the principles of equity jurisprudence, as they are known and applied in that system, which became by adoption part of the law of the United States, to be administered in the federal courts.

“Upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person may be found, although lands not within the jurisdiction of that court may be affected by the decree. The inquiry, therefore, will be, whether this be an un-mixed question of title, or a case of fraud, trust, or contract.”

¹ U. S. v. Reid, 12 Howard, 361.

CHAPTER II.

CASES AFFECTING AMBASSADORS, OTHER PUBLIC MINISTERS,
AND CONSULS.

§ 31. The next class of cases assigned by the Constitution to the judicial power of the United States, includes "all cases affecting ambassadors, other public ministers, and consuls." These cases were included in the jurisdiction of the national tribunals, from motives of the most important national policy. Involving the relations of the national government with foreign powers, it is extremely fit that the national judiciary should be able to reach controversies of this description.

§ 32. They constitute a class of cases where the nature of the controversy is, in some degree, blended with the character of the party.¹ An ambassador, or other public minister, may be "affected" by a cause, according to the meaning of the Constitution, and yet he may not be a party to the record. Indeed, it was the obvious purpose of the Constitution, not to make the jurisdiction in this class of cases to depend upon the fact that the ambassador is a party, but to give the national tribunals jurisdiction wherever this class of public functionaries were "affected." What is the precise force and extent to be given to this comprehensive expression, must depend in some degree upon the great purposes for which this clause was introduced into the Constitution.²

¹ *Osborn v. U. S. Bank*, 9 Wheat. 738, 854.

² In *Osborn v. The U. S. Bank*, 9 Wheaton, 854, the Supreme Court said: "If a suit be brought against a foreign minister, the Supreme Court alone has original jurisdiction, and this is shown on the record."

§ 33. Its object was to insure to foreign ministers and agents, of each of the classes designated, the protection and immunity which the law of nations, or the municipal law of the United States, accords to them. That protection and that immunity are not confined to the person of the minister himself. They extend, in some degree, to those who serve under him in subordinate diplomatic situations, and to his family and servants. When, therefore, the Constitution of the United States declares that the judicial power shall extend to all cases affecting a foreign minister, it employs a broad expression, which must be understood to embrace not only cases in which the minister has a personal interest, but also those cases where the diplomatic immunity and privileges of the minister are invaded or involved, in the person of any one who is entitled to claim them through him, although the minister himself may not be a party to the proceeding. In this sense, he is clearly "affected," since a right, privilege, or exemption, claimed through him by virtue of his official character, is involved. On the other hand, if there is involved no such right, privilege, or exemption, claimed by the minister himself, or by some one

But, suppose a suit to be brought which affects the interest of a foreign minister, or by which the person of his secretary, or his servant, is arrested. The minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction of the court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the Constitution in the two cases is different. This court can take cognizance of all cases "affecting" foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes when the enumeration proceeds to states. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national courts jurisdiction over all cases by which they were in any manner affected. In the case of states, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties."

through him, as attaching to and flowing from his official character, he cannot be "affected" by the suit in the sense of the Constitution, unless pecuniarily interested in its result. A pecuniary interest, however, ought, it would seem, to be direct and immediate, not remote and consequential.

§ 34. The Supreme Court have held that when the United States proceed by indictment for an offence against the law of nations, and that of the United States, by an assault committed upon a public minister by an individual, it is a case which affects the United States and the person whom they seek to punish, but one in which the minister himself, although he was the person injured by the assault, has no concern, either in the event of the prosecution, or in the costs attending it.¹

§ 35. Who are foreign ministers, within the privileges secured by the Constitution, depends entirely upon recognition by the executive department of the government. The courts of the United States cannot inquire whether a person, recognised by the President as a foreign minister, was duly appointed by the government he claims to represent. The action of the President is conclusive.² It seems, too, that the diplomatic character continues, until the party has left the country to return to his own, although he may have been superseded in his functions. It was held by the Supreme Court, that the chargé d'affaires of a foreign government near the United States, whose official functions ceased on the arrival of a minister of that government, but who was detained in the United States by circumstances, was not amenable to civil process.³

¹ U. States *v.* *Ortiga*, 11 Wheat. 467, 469.

² U. States *v.* *Ortiga*, 4 Wash. C. C. R. 531.

³ *Dupont v. Pichon*, late Chargé d'Affaires of France, 4 Dallas, 321.

CHAPTER III.

CASES OF ADMIRALTY AND MARITIME JURISDICTION.

§ 36. WE now come to one of the classes of cases where the jurisdiction of the courts of the United States depends upon the character of the controversy, without regard to the character of the parties, namely, "all cases of admiralty and maritime jurisdiction."

§ 37. The principle which defines the jurisdiction granted by these few comprehensive words is, that it embraces what was known and understood in the United States, as the admiralty and maritime jurisdiction, at the time when the Constitution was adopted.¹ Much controversy has existed, and there has been some discrepancy between the authoritative decisions as to the nature and extent of this jurisdiction. But the general and uniform interpretation has pointed to a division of the subjects of this jurisdiction into two great branches; the one depending purely upon the locality of the act done, which is the subject of controversy, and the other depending upon the nature of the contract which forms the subject of the suit, in which, indeed, the locality where it was to be performed enters as an ingredient. The class of cases, in reference to which the jurisdiction depends purely upon locality, may be subdivided into three: viz., 1, Captures made *jure belli* upon certain waters, and all questions of prize and their incidents arising therefrom; 2, Crimes

¹ The Propeller *Genesee Chief*, &c., v. Fitzhugh, 12 Howard, 443; The New Jersey Steam Navigation Co. v. The Merchants' Bank, 6 Howard, 344; Waring v. Clarke, 5 Howard, 441.

and offences against the laws of the United States committed upon the same waters; 3, Civil acts, torts, and injuries committed upon the same waters, not under claim or color of exercising the rights of war, as assaults and personal injuries, collisions of ships, illegal seizures or depredations upon property, illegal dispossession of ships, seizures for breaches of revenue laws, and salvage services.

§ 38. And here the question arises, which has led to a conflict of decisions, as to the locality on which the whole jurisdiction depends. What are the waters, embraced within the admiralty and maritime jurisdiction conferred by the Constitution, and over which it is competent to Congress to extend that jurisdiction? With reference to this inquiry, it is to be observed, in the first place, that no doubt has been entertained, that it embraces what are called the "high seas," an expression in which are included all tide-waters, up to the line of high water mark.¹ The doubt has been with reference to other waters, where the tide does not ebb and flow;—whether the Constitution intended to limit the admiralty jurisdiction to what are technically called the "high seas," or whether it extends to any and what waters above and beyond the line of high water mark? Upon this question, before noticing the recent decision of the Supreme Court of the United States, which has reversed former constructions of the Constitution, it will be proper to state the result of previous cases.

§ 39. The doctrine which had been acted upon until very recently, in reference to the admiralty jurisdiction, was, that in cases dependent upon locality, the jurisdiction is limited to the sea, and to tide waters, as far as the tide flows, and that it does not reach beyond high water mark. Thus, it was held that under *this clause* of the Constitution, the

¹ United States v. Coombs, 12 Peters, 72; The Thomas Jefferson, 10 Wheat. 428; The Steamboat Orleans v. Phœbus, 11 Peters, 175; Waring v. Clarke, 5 Howard, 441.

authority of Congress does not extend to the punishment of offences committed above and beyond high water mark;¹ that the admiralty jurisdiction, in cases of part owners, does not extend to a vessel, whose substantial employment is above tide water, although one terminus of her usual voyages may have been in tide water;² and that it does not embrace a suit for wages, where the service is performed mainly upon waters that are not tide waters, although it might embrace a case where the service was essentially maritime, although the voyage commenced above the ebb and flow of the tide.³ These decisions, therefore, had given an interpretation to the Constitution, which confined the admiralty jurisdiction, so far as it depended upon locality, to tide waters.

§ 40. But the recent enactment of an Act of Congress, giving to certain of the courts of the United States admiralty jurisdiction in certain cases arising upon the western lakes and rivers, has led to a revision of this doctrine, and to a much broader construction of the Constitution. It is now settled that the admiralty jurisdiction is not limited to tide waters, but extends to all public navigable lakes and rivers, where commerce is carried on between different States, or with a foreign nation. The case in which this question arose was a proceeding *in rem* for a collision upon the waters of Lake Ontario, instituted under the Act of Congress, extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same.⁴ The Supreme Court of the United States said:—

“When the Act of Congress was passed, under which these proceedings were had, serious doubts were entertained of its constitutionality. The language and decision of this court, whenever a question of admiralty jurisdiction had come before it, seemed to imply that under the Constitution

¹ United States *v.* Coombs, 12 Peters, 75, 78.

² Steamboat Orleans *v.* Phœbus, 11 Peters, 175.

³ The Thomas Jefferson, 10 Wheat. 428.

⁴ The Propeller Genesee Chief *v.* Fitzhugh, 12 Howard, 443, 451.

of the United States, the jurisdiction was confined to tide waters. Yet the conviction that this definition of admiralty powers was narrower than the Constitution contemplated, has been growing stronger every day with the growing commerce on the lakes and navigable rivers of the Western States. And the difficulties which the language and decisions of this court had thrown in the way, of extending it to these waters, have perhaps led to the inquiry whether the law in question could not be supported under the power granted to Congress to regulate commerce. This proposition has been maintained in a recent work upon the jurisdiction, law, and practice of the courts of the United States in admiralty and maritime causes, which is entitled to much respect, and the same ground has been taken in the argument of the case before us.

“The law, however, contains no regulations of commerce; nor any provision in relation to shipping and navigation on the lakes. It merely confers a new jurisdiction on the district courts; and this is its only object and purpose. It is entitled ‘An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same;’ and the enacting clause conforms to the title. It declares that these courts shall have, possess, and exercise the same jurisdiction in matters of contract and tort, arising in, or upon, or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories, as was at the time of the passage of the law possessed and exercised by the district courts in cases of like steamboats and other vessels employed in navigation and commerce on the high seas, or tide waters within the admiralty and maritime jurisdiction of the United States.

“It is evident, therefore, from the title as well as the body of the law, that Congress, in passing it, did not intend to exercise their power to regulate commerce; nor to derive

their authority from that article of the Constitution. And if the constitutionality of this law is supported as a regulation of commerce, we shall impute to the Legislature the exercise of a power which it has not claimed under that clause of the Constitution ; and which we have no reason to suppose it deemed itself authorized to exercise.

“Indeed, it would be inconsistent with the plain and ordinary meaning of words, to call a law defining the jurisdiction of certain courts of the United States a regulation of commerce. This law gives jurisdiction to a certain extent over commerce and navigation, and authorizes the court to expound the laws that regulate them. But the jurisdiction to administer the existing laws upon these subjects is certainly not a regulation within the meaning of the Constitution. And this Act of Congress merely creates a tribunal to carry the laws into execution, but does not prescribe them.

“Nor can the jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connexion with one another, and are conferred in the Constitution by separate and distinct grants. The extent of the judicial power is carefully defined and limited, and Congress cannot enlarge it to suit even the wants of commerce, nor for the more convenient execution of its commercial regulations. And the limits fixed by the Constitution to the judicial authority of the courts of the United States would form an insuperable objection to this law, if its validity depended upon the commercial power.

“This power is as extensive upon land as upon water. The Constitution makes no distinction in that respect. And if the admiralty jurisdiction, in matters of contract and tort which the courts of the United States may lawfully exercise on the high seas, can be extended to the lakes, under the power to regulate commerce, it can with the same propriety and upon the same construction be extended to contracts and torts on land, when the commerce is between different states. And it may embrace, also, the vehicles and persons

engaged in carrying it on. It would be in the power of Congress to confer admiralty jurisdiction upon its courts, over the cars engaged in transporting passengers or merchandise from one state to another, and over the persons engaged in conducting them, and deny to the parties the trial by jury. Now the judicial power, in cases of admiralty and maritime jurisdiction, has never been supposed to extend to contracts made on land and to be executed on land. But if the power of regulating commerce can be made the foundation of jurisdiction in its courts, and a new and extended admiralty jurisdiction, beyond its heretofore known and admitted limits, may be created on water under that authority, the same reason would justify the same exercise of power on land.

“Besides, the jurisdiction established by this Act of Congress does not depend on the residence of the parties. And under the admiralty powers conferred on the district courts, they are authorized to proceed *in rem* or *in personam* in the cases mentioned in the law, although the parties concerned are citizens of the same state. If the lakes and waters connecting them are within the admiralty and maritime jurisdiction, as conferred by the Constitution, then undoubtedly this authority may be lawfully exercised, because this jurisdiction depends upon the place, and not upon the residence of the parties.

“But if the admiralty jurisdiction is confined to tide water, the courts of the United States can exercise over the waters in question nothing more than ordinary jurisdiction in cases at common law and equity. And in cases of this description they have no jurisdiction, if the parties are citizens of the same state. This being an express limitation in the grant of judicial power, no Act of Congress can enlarge it. And if the validity of the Act of 1845 depended upon the power to regulate commerce, it would be unconstitutional, and could confer no authority on the district courts.

“If this law, therefore, is constitutional, it must be sup-

ported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States when the Constitution was adopted.

“If the meaning of these terms was now for the first time brought before this court for consideration, there could, we think, be no hesitation in saying that the lakes and their connecting waters were embraced in them. These lakes are, in truth, inland seas. Different states border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes have been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established neither can the other.

“Again, the Union is formed upon the basis of equal rights, among all the states. Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be ruin, but also to administer the law of nations in a season of wars, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed, to confine these rights to the state bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes, and the great navigable streams which flow through the Western States. Certainly such was not the intention of the framers of the Constitution; and if such be the construction finally given to it by this court, it must necessarily produce great public inconvenience, and, at the same time, fail to accom-

plish one of the great objects of the framers of the Constitution: that is, a perfect equality in the rights and the privileges of the citizens of the different states; not only in the laws of the general government, but in the mode of administering them. That equality does not exist, if the commerce on the lakes and on the navigable waters of the West are denied the benefits of the same courts and the same jurisdiction for its protection, which the Constitution secures to the states bordering on the Atlantic.

“The only objection made to this jurisdiction is, that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and this country at the time the Constitution was adopted, was confined to the ebb and flow of the tide.

“Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason, and, indeed, would seem to be inconsistent with it.

“In England, undoubtedly the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tide-waters. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, tide-water and navigable water are synonymous terms, and tide-water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was

a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters.

“At the time the Constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen states the far greater part of the navigable waters are tide-waters. And in the states which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide-water to the head of navigation. And, indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide-water. And that definition having found its way into our courts, became, after a time, the familiar mode of describing a public river, and was repeated as cases occurred, without particularly examining whether it was as universally applicable in this country as it was in England. If there were no waters in the United States which are public, as contradistinguished from private, except where there is tide, then unquestionably here as well as in England, tide-water must be the limits of admiralty power. And as the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it was limited by the tide. The description of a public navigable river was substituted in the place of the thing intended to be described. And under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on, after it

had ceased, from a change in circumstances, to be the true description of public waters. It was under the influence of these precedents and this usage, that the case of the *Thomas Jefferson*, 10 Wheat. 428, was decided in this court; and the jurisdiction of the courts of admiralty of the United States declared to be limited to the ebb and flow of the tide. *The Steamboat Orleans v. Phoebus*, 11 Pet. 175, afterwards followed this case, merely as a point decided.

“It is the decision in the case of the *Thomas Jefferson* which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825, when the commerce on the rivers of the West and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day.

“Moreover, the nature of the questions concerning the extent of the admiralty jurisdiction, which have arisen in this court, were not calculated to call its attention particularly to the one we are now considering. The point in dispute has generally been, whether the jurisdiction was not as limited in the United States, as it was in England, at the time the Constitution was adopted. And if it was so limited, then it did not extend to contracts for maritime services when made on land; nor to torts and collisions on a tide-water river, if they took place in the body of a county. The attention of the court, therefore, in former cases, has been generally strongly attracted to that question, and never, we believe, until recently, drawn to the one we are now discussing, except in the case of the *Thomas Jefferson*, afterwards followed in the *Steamboat Orleans v. Phoebus*, as already men-

tioned. For, with this exception, the case always arose on contracts for services on tide-water, or were upon libels for collisions or other torts committed within the ebb and flow of the tide. There was, therefore, no necessity for inquiring whether the jurisdiction extended further in a public navigable water. And following the English definition, tide was assumed and spoken of as its limit, although that particular question was not before the court.

"The attention of the court was, however, drawn to this subject in the case of *Waring v. Clarke*, 5 How. 441, which was decided in 1848. The collision took place on the Mississippi River, near the bayou Goulah, and there was much doubt whether the tide flowed so high. There was a good deal of conflicting evidence. But the majority of the court thought there was sufficient proof of tide there, and consequently it was not necessary to consider whether the admiralty power extended higher.

"But that case showed the unreasonableness of giving a construction to the Constitution which would measure the jurisdiction of the admiralty by the tide. For, if such be the construction, then a line drawn across the river Mississippi would limit the jurisdiction, although there were ports of entry above it, and the water as deep and navigable, and the commerce as rich, and exposed to the same hazards and incidents, as the commerce below. The distinction would be purely artificial and arbitrary, as well as unjust, and would make the Constitution of the United States subject one part of a public river to the jurisdiction of a court of the United States, and deny it to another part equally public and but a few yards distant.

"It is evident, that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable waters, including lakes and rivers, in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for

commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters ; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States.

“We are the more convinced of the correctness of the rule we have now laid down, because it is obviously the one adopted by Congress in 1789, when the government went into operation. For the 9th section of the Judiciary Act of 1789, by which the first courts of admiralty were established, declares that the district courts “shall have exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas.”

“The jurisdiction is here made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable, it was deemed to be public ; and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution.

“It so happened that no seizure was made, and no case calling for the exercise of admiralty power arose for a long period of time, upon any navigable water where the tide did not ebb and flow. As we have before stated, there were no navigable waters in the United States upon which commerce, in the usual acceptation of the word, was carried on, except tide-water, until the valley of the Mississippi was settled and cultivated, and steamboats invented, and no case, therefore, came before the court during the early period of the government that required it to determine whether this jurisdiction could be extended above tide. It is perhaps to be regretted that such a case did not arise ; for we are persuaded that if one had occurred, and attracted the attention of the court to this point before the English definition had become the settled mode of describing the jurisdiction, and before the

courts had been accustomed to adhere strictly to the English mode of pleading, in which the place is always averred to be within the ebb and flow of the tide, the definition in the Act of 1789, which is so evidently the correct one, would have been adopted by the courts, and the difficulty which has now arisen would not have taken place.

“This legislative definition, given at this early period of the government, is certainly entitled to great consideration. The same definition is in effect again recognised by Congress, by the passage of the act which we are now considering. We have therefore the opinion of the legislative department of the government, twice deliberately expressed, upon the subject. These opinions of course are not binding on the judicial department, but they are always entitled to high respect. And in this instance we think they are founded in truth and reason; and that these laws are both constitutional, and ought therefore to be carried into execution. The jurisdiction under both laws is confined to vessels enrolled and licensed for the coasting trade; and the Act of 1845 extends only to such vessels when they are engaged in commerce between different states or territories. It does not apply to vessels engaged in the domestic commerce of a state; nor to vessels or boats not enrolled and licensed for the coasting trade under the authority of Congress. And the state courts within the limits embraced by this law, exercise a concurrent jurisdiction in all cases arising within their respective territories, as broadly and independently as it is exercised by the old thirteen states (whose rivers are tide-waters), and where the admiralty jurisdiction has been in full force ever since the adoption of the Constitution.

“The case of the *Thomas Jefferson* did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it, notwithstanding the opinion we have expressed. For every one would suppose, that after the decision of this court, in a matter of that kind, he might safely enter into contracts, upon the faith that

rights thus acquired would not be disturbed. In such a case, *stare decisis* is the safe and established rule of judicial policy, and should always be adhered to. For if the law, as pronounced by the court, ought not to stand, it is in the power of the legislature to amend it, without impairing rights acquired under it. But the decision referred to has no relation to rights of property. It was a question of jurisdiction only, and the judgment we now give can disturb no rights of property, nor interfere with any contracts heretofore made. The rights of property and of parties will be the same by whatever court the law is administered. And as we are convinced that the former decision was founded in error, and that the error, if not corrected, must produce serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it.

“The principal objection made to the admiralty jurisdiction is the want of the trial by jury. And it is this feature in the admiralty practice which made it the object of so much jealousy in England in the time of Lord Coke, and enabled him to succeed in his efforts to restrict it to very narrow limits. But experience in England has proved that a wider range of jurisdiction was necessary for the benefit of commerce and navigation; and that they needed courts acting more promptly than courts of common law, and not entangled with the niceties and strictness of common-law pleadings and proceedings. And during the reign of the present queen, the admiralty jurisdiction has been extended to maritime services and contracts, and to torts in navigable waters, although the place where the service was performed, or the contract made, or the tort committed, was within the body of a county, and within the jurisdiction of the courts of common law. A concurrent jurisdiction is reserved to the last-mentioned courts, if the party complaining chooses to select that mode of proceeding. But in the new and extended jurisdiction of the English admiralty, the old objection remains, and neither party is entitled to a trial by jury. The court in its discretion may send the question of fact to a jury,

if it thinks proper to do so. But the party cannot demand it as a matter of right. Yet the English people have certainly lost nothing of their attachment to the trial by jury since the days of Lord Coke. And this recent and great enlargement of the admiralty power is strong proof that the want of it has been felt, and that experience has shown its necessity where the interests of an extensive commerce and navigation are concerned.

“But the Act of Congress of which we are speaking is free from the objection to which the English statute is liable. Like the English statute, it saves to the party a concurrent remedy at common law in any court of the United States, or of a state, which may be competent to give it. But it goes further. It secures to the parties the trial by jury as a matter of right in the admiralty court. Either party may demand it. And it thus effectually removes the great and leading objection always heretofore made to the admiralty jurisdiction.

“The power of Congress to change the mode of proceeding in this respect in its courts of admiralty, will, we suppose, hardly be questioned. The Constitution declares that the judicial power of the United States shall extend to ‘all cases of admiralty and maritime jurisdiction.’ But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power, as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. In admiralty and maritime cases, there is no such limitation as to the mode of proceeding, and Congress may, therefore, in cases of that description, give either party a right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to

the administration of justice. And in the proceedings under the Act of 1845, the right to a trial by jury is undoubtedly secured to either party, if he thinks proper to demand it.

“In the case before us, no jury was required by the libellants or respondents, and the questions of fact, as well as of law, were therefore decided by the court.”

§ 41. The question now arises, how this decision affects the admiralty jurisdiction over tide-waters, and what rule of determination it establishes with reference to all waters which come within the definition of public navigable waters where commerce is carried on between different states or a foreign country. Formerly, as we have seen, the locality of the admiralty jurisdiction was supposed to be confined to tide-waters. In this view of the Constitution, the test which determined whether a case was of the character of admiralty and maritime causes, was established with reference to the place where the act was done, or where the service was rendered. If the contract was one where the service, being of a maritime nature, was to be performed chiefly upon the waters admitted to be within the admiralty jurisdiction, that is to say, upon the high seas, although the voyage might have commenced or terminated out of the jurisdiction, the cause was held to belong to the jurisdiction. But the recent decision has declared that the jurisdiction embraces all public navigable waters, where inter-state or foreign commerce is carried on. What, then, will be the standard of determination as to the character of the cause, in reference to the latter description of waters, and what will it be, in reference to tide-waters?

§ 42. Following the analogy of former decisions, made under that view of the Constitution which confined the locality of the admiralty jurisdiction to tide-waters, we find that, in reference to contracts and quasi-contracts, it was the maritime nature of the service, which determined the admiralty character of the cause: that is to say, a service which

related to maritime navigation, or navigation upon the waters admitted to be in the locality of the admiralty jurisdiction, would constitute the proper subject of an admiralty and maritime cause. But it is now settled, that the locality of the admiralty jurisdiction embraces waters which are otherwise described. What, then, will be the standard which will determine the character of the cause? If we apply the former analogy, it would seem that the character of the waters where the service is performed, together with the fact that the service relates to the navigation of waters of that character—that is, to navigation between different states, or between a state and a foreign country—will decide that the cause is of admiralty jurisdiction. Public waters, where such navigation is carried on, being the place, a service that is to be of an admiralty character must be rendered substantially in that place; and if the voyage does not cover that place, that is, if it be not substantially performed between different states, or a state and a foreign country, the waters where it is performed cannot, as to that contract, be public navigable waters of the requisite character, whatever they may be as to other contracts and in other cases.

§ 43. The description of public navigable waters where inter-state or foreign commerce is carried on, of course includes the high seas, which comprehend technically all waters where the tide ebbs and flows, to high water mark. These waters remain, therefore, subject to the admiralty jurisdiction, under the recent, as well as the former, construction of the Constitution. The contiguous waters in bays, rivers, and arms of the sea, above the line of the flow of the tide, will or will not be embraced within the admiralty jurisdiction, according to their character. If they are public navigable waters, where commerce is carried on between different states, or with a foreign nation, they will be within the admiralty jurisdiction of the Constitution, and it will be competent to Congress, under the grant of that jurisdiction, to give reme-

dies in admiralty as to ships and vessels engaged upon those waters, in such commerce.¹

§ 44. With regard to the cases where jurisdiction depends purely upon the locality of the act, crimes and offences against the laws of the United States, civil torts, seizures made *jure belli*, and seizures for violation of revenue laws, are to be classed under this branch of the jurisdiction. We will consider these several cases briefly in their order.

§ 45. And first, as to crimes and offences against the laws of the United States. The criminal jurisdiction, in admiralty, as it is dependent upon locality, is co-extensive with the civil jurisdiction. Whatever waters are included in the one must be embraced in the other also, for the grant in the Constitution is of "all cases of admiralty and maritime jurisdiction." This cession is not a cession of the waters on which these cases may arise, but it is a cession of jurisdiction over a class of cases, whose character is determined by the fact that they arise upon those waters. Whatever is necessary to the full and unlimited exercise of this admiralty and maritime jurisdiction, is within the scope of the judicial power; and consequently, it is in the power of Congress to confer jurisdiction upon the courts of the United States over offences committed upon the waters embraced by the admiralty jurisdiction.² Whether this jurisdiction is exclusive, will be considered hereafter.

§ 46. The jurisdiction in cases of civil torts is governed by the same principles which regulate the jurisdiction in all other cases which depend upon the locality of the act done. A trespass upon the person, or upon property, committed upon the waters embraced by the admiralty jurisdiction, is a case belonging to that jurisdiction, and the courts of the

¹ *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 393.

² *United States v. Bevens*, 3 Wheaton, 336.

United States may proceed therein either *in personam* or *in rem*.¹ And the jurisdiction is not ousted by the fact that the act was done *infra corpus comitatûs*, provided the place was within the waters to which the Constitution intended the admiralty jurisdiction should extend;² and the character of those waters is now defined to be, all public navigable waters where an inter-state or foreign commerce is carried on.³

§ 47. Cases of seizures are of two classes: seizures for breaches of revenue laws, and seizures made in the exercise of the rights of war. Cases of the first class have repeatedly been held to be within the admiralty jurisdiction. The point first arose in the case of the *Vengeance*,⁴ in 1796, nine years after the adoption of the Constitution. It was a case of seizure made in the port of New York, for violation of an Act of Congress prohibiting the exportation of arms. The court held it to be a civil cause of admiralty and maritime jurisdiction. Subsequent cases, all of which have been seizures *infra corpus comitatûs*, have affirmed the correctness of this decision;⁵ and the Supreme Court have recently declared that cases of seizure arising under the revenue and navigation laws, where the seizure is made within tide-waters, are civil causes of admiralty and maritime jurisdiction within the words of the Constitution.⁶ It is the place of seizure, and not the place of committing the offence, that determines the jurisdiction.

§ 48. The Judiciary Act of 1789, ch. 20, includes as causes of admiralty and maritime jurisdiction, all seizures

¹ *Manro v. Almeida*, 10 Wheaton, 473; *Chamberlain v. Chandler*, 3 Mason, 242.

² *Waring v. Clark*, 5 Howard, 441.

³ *Propeller Genesee Chief v. Fitzhugh*, 12 Howard, 443.

⁴ 3 Dallas, 297.

⁵ *The Sally*, 2 Cranch, 406; *The Betsey*, 4 Cranch, 443; *The Samuel*, 1 Wheat. 9; *The Octavia*, *Ibid.* 20.

⁶ *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 Howard, 344.

for forfeitures made under laws of impost, navigation, and trade, "on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas."¹ The waters which are thus described are a part of the locality of the admiralty jurisdiction, and are thus distinguished from waters not navigable from the sea, for the purpose of distinguishing the cases which arise upon them, and of classing those which arise upon the waters thus navigable among the civil causes of admiralty and maritime jurisdiction. It is a mode of describing tide-waters which may be within the body of a county; and it has been repeatedly held that the classification thus made is in accordance with the Constitution.²

§ 49. In like manner, seizures made *jure belli* upon the waters over which the admiralty jurisdiction extends, which comprehend the prize jurisdiction, belong to the civil causes of admiralty and maritime jurisdiction conferred by the Constitution upon the national judiciary. In this class of cases, the locality of the seizure is what determines the jurisdiction, and it embraces all the incidents of the capture.³

§ 50. That branch of the jurisdiction which embraces contracts and quasi-contracts, or services of various kinds, depends upon something more than the mere locality of the transaction. The place where the contract was to be performed, if it be a case of contract, or where the service was rendered, if it be a case of service implying a contract, enters into the question of jurisdiction; but there must be the further element of a maritime character, in the nature and subject-matter of the service or contract, to bring it within

¹ § 9.

² The Margaret, 9 Wheat. 421; The Betsey, 4 Cranch, 443; New Jersey Steam Navigation Co. v. Merchants' Bank, 6 Howard, 389.

³ Glass v. The Betsey, 3 Dallas, 6; The Amiable Nancy, 3 Wheat. 546; Brown v. The U. States, 8 Cr. 110; The U. States v. Peters, 3 Dall. 121; Penhallow v. Doane, Ibid. 54; Jennings v. Carson, 4 Cr. 2; The Emulous, 1 Gallis. 570.

the admiralty jurisdiction. This character, however, in most, if not in all of the cases, is derived from the character of the waters where the service is rendered, or where the contract is performed. If the waters, where the service is rendered, or the contract is performed, be within the admiralty jurisdiction, the case will in general be of an admiralty character, although it may have commenced or terminated beyond the line of demarcation. But if the substantial part of the service under the contract is to be performed beyond that line, or if the contract relates exclusively to the interior navigation and trade of a state, jurisdiction is disclaimed.¹

§ 51. Thus in the cases of *material men* for repairs and necessities furnished to a foreign ship, or to a domestic ship where the local law gives a lien, the jurisdiction *in rem* has always been maintained in this country. It depends upon the nature of the contract, and the place where it is performed. The fact that the supplies or repairs are furnished to a foreign ship (and a ship owned in another state is for this purpose foreign), and that a maritime lien is thereby created, makes the contract a maritime contract; and if it is performed at a place within the local limits of the admiralty jurisdiction, the creditor may proceed in the admiralty, either *in rem*, or *in personam*.² And if the service was essentially a maritime service, and was performed upon waters within the admiralty jurisdiction, it is not material that the vessel is to be employed in navigating waters beyond that jurisdiction.³

§ 52. It is further held, that in cases of repairs and necessities furnished to a domestic ship, in a place where the

¹ The *Thomas Jefferson*, 10 Wheat. 428; *Peyroux v. Howard*, 7 Peters, 324; *Steamboat Orleans v. Phœbus*, 11 Peters, 175; *Waring v. Clarke*, 5 Howard, 441; *New Jersey Steam Navigation Co. v. The Merchants' Bank*, 6 Howard, 344, 389, 392.

² The *General Smith*, 4 Wheat. 438.

³ *Peyroux v. Howard*, 7 Peters, 324.

admiralty jurisdiction exists, if the local law gives a lien, it may be enforced in the admiralty by a proceeding *in rem*.¹ But the full consideration of the subjects of the admiralty jurisdiction belongs to that part of this work, in which it is designed to treat of the jurisdiction of the District Courts.

¹ The General Smith, *ut supra*; Peyroux v. Howard, *ut supra*.

CHAPTER IV.

CONTROVERSIES TO WHICH THE UNITED STATES SHALL BE A PARTY.

§ 53. THE next class of the subjects of the judicial power are "Controversies to which the United States shall be a party." Upon the force to be given to this clause depends the very important questions, whether suits can be brought against the United States without the authority of Congress? and whether it is competent to Congress to give that authority? Controversies, to which the United States may be a party as plaintiff, or actor, are obviously embraced by this clause. But whether it also embraces controversies, to which the United States are a party as defendant, is not so clear.

§ 54. The same section of the Constitution extends the judicial power to "*controversies* between a state and the citizens of another state;" and upon this original clause it was held, at an early period in the history of the government, that a state might be sued by individual citizens of another state, and an amendment of the Constitution was adopted to obviate the supposed inconvenience of this provision. The ground on which the decision proceeded was, that although no sovereignty is amenable to judicial process without its consent, it is competent to every sovereignty to give such consent, and the states had given it, by assenting to the Constitution with this provision.¹ More recently, the doctrine, that a sovereign state is not liable to suit except by

¹ *Chisholm's Ex'ors v. The State of Georgia*, 2 Dallas, 419, 478.

its own consent, was re-affirmed by the Supreme Court, and the principle was laid down that consent need not be given in each case, but might be given by a general law; so that the question, whether a state has surrendered this attribute of sovereignty, depends on the instrument by which the surrender is supposed to be made, namely, upon the Constitution.¹

§ 55. If, now, we apply this reasoning to the case of the United States, whose sovereignty in this respect is entirely analogous to that of a state, it is apparent that the United States cannot be sued without their own consent. The question is, therefore, whether, by force of this clause in the Constitution, by which the judicial power is extended to "controversies to which the United States shall be a party," that consent has already been given, or whether the action of Congress is necessary to give that consent in a particular case, or in a class of cases, or in all cases, before the United States can be sued. One reason which has been assigned why this clause of the Constitution should not be deemed of itself to import a consent to be sued, is, that the national judiciary is supported in its proceedings by the executive power, by which its judgments are carried into effect, and that this power might act against a state; but in a case of a suit against the United States, the government would be called upon to act against itself, there being no other power on which the judiciary could rely.² But even if this objec-

¹ *Cohens v. Virginia*, 6 Wheaton, 264, 380.

² Per Jay, Ch. Justice, in *Chisholm v. Georgia*, 2 Dallas, 478: "I perceive, and therefore candor urges me to mention, a circumstance which seems to favor the opposite side of the question. It is this: the same section of the Constitution which extends the judicial power to *controversies* 'between a state and the citizens of another state,' does also extend that power to *controversies to which the United States are a party*. Now, it may be said, if the word *party* comprehends both plaintiff and defendant, it follows that the United States may be sued by any citizen, between whom and them there may be a *controversy*. This appears to me to be by fair reasoning; but the same principles of candor

tion would not equally exist, in the case of a suit expressly authorized by Congress to be brought against the United States, it would seem that it touches only the power of executing the judgment, and not the power of entertaining the suit, and deciding upon the controversy. The national tribunals are established for the purpose of adjudicating certain controversies, which are placed under their cognizance for certain great reasons of fitness and policy; and perhaps their power of carrying into effect the results of adjudication may not, in all cases, be a test of their power to receive and entertain the cause.

§ 56. But, however this may be, it would seem that the true construction of this clause depends upon other considerations. The language is, "*controversies to which the United States shall be a party.*" In the first place, this language does not confer the jurisdiction of any such controversies upon any particular court, but merely places them within the scope of the judicial power. Legislation is therefore necessary, in order to designate the tribunal in which such causes are to originate. In the second place, it does not confer upon the national tribunals cognizance of *all* controversies to which the United States shall be a party, but only cognizance of some. It remains, therefore, for Congress

which urge me to mention this objection, also urge me to suggest an important difference between the two cases. It is this: In all cases of actions against states or individual citizens, the national courts are supported in all their legal and constitutional proceedings and judgments by the arm of the executive power of the United States; but, in cases of actions against the United States, there is no power which the courts can call to their aid. From this distinction important conclusions are deducible, and they place the case of a state, and the case of the United States in very different points of view.

"I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is or is not now the case ought not to be thus collaterally and incidentally decided. I leave it a question."

to designate what controversies shall be submitted to judicial cognizance. In the third place, the word "controversies" seems to embrace only civil suits; for, where all suits, criminal and civil, are evidently intended to be included, the Constitution employs the term "cases." But to a civil suit, a sovereignty cannot be made a party without its consent; and as the clause in question embraces only controversies to which the United States "shall be" a party, it would seem to be the reasonable intendment, that such controversies only are embraced by it, as those to which the United States shall consent to become a party, by the action of the legislative department of the government. Congress never having authorized suits to be brought against the United States, the universally received opinion has been, that such a suit cannot be commenced or prosecuted.¹ But, as we shall see hereafter, this does not prevent the exercise of appellate jurisdiction, to obtain by writ of error a reversal of a judgment which has been rendered in favor of the United States.² Nor does it preclude individuals, when sued by the United States, from availing themselves of credits or set-offs against the United States.³

§ 57. But would the clause of the Constitution authorize Congress to allow suits to be brought by individuals against the United States? or, in other words, does the clause itself import a consent, on the part of the national sovereignty, to be sued in any case, which the legislature may see fit to make the subject of judicial cognizance? It is to be observed, that the language of the clause makes no discrimination between suits brought *by* and suits brought *against* the United States. . The only limitation is to controversies to which the United States "*shall be* a party," a mode of expression that seems to imply some act on the part of the United States to

¹ *Cohens v. Virginia*, 6 Wheaton, 264, 411, 412; Story's Commentaries on the Constitution, § 1669.

² *Ibid.*

³ *The United States v. The Bank of the Metropolis*, 15 Peters, 377, 392.

make itself a party, as if it had read "controversies to which the United States shall *become* a party." The United States becomes a party plaintiff by instituting a suit; and they might become a party defendant, by authorizing a suit to be brought, and directing the mode in which redress should be obtained. The objection suggested by Mr. Chief Justice Jay, in *Chisholm v. Georgia*, that the government would be called upon to act against itself, in order to give effect to the adjudication, may furnish a sufficient reason why the Constitution alone should not be deemed to authorize suits against the United States, without the consent of Congress; but it does not seem to furnish a reason why the Constitution may not be considered as authorizing Congress to give a remedy and provide for the satisfaction of the judgment, for when that is done, the whole objection is removed.¹

¹ Mr. Justice Story, in his Commentaries on the Constitution, while lamenting the absence of any provisions to enable the creditors of the United States to sue, takes it for granted that such provisions would be constitutional, and refers to the English proceeding of a petition of right. Story's Com. § 1672.

CHAPTER V.

CONTROVERSIES BETWEEN TWO OR MORE STATES, ETC.

§ 58. THE next clause of the Constitution embraces within the judicial power "controversies between two or more states; between a state and the citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants of different states; and between a state or the citizens thereof, and foreign states, citizens, or subjects."

§ 59. All of these cases, except those relating to land titles, belong to that branch of the judicial power which has been made to depend upon the character or situation of the parties, without reference to the character of the controversy. Jurisdiction in these cases has been given because the parties bear a certain character; and it is a general rule, that in all cases where jurisdiction depends on the party, it is the party named on the record.¹ We shall see numerous illustrations of this rule in the examination of these different classes of cases.

§ 60. And first, with regard to "controversies between two or more states." The great purpose with which this class of cases was embraced within the judicial power, was, to guard the peace and integrity of the Union, by providing for an adjudication by the national tribunals of every species of controversy between the several states, which is capable

¹ *Osborne v. The Bank of the United States*, 9 Wheat. 738; *The Governor of Georgia v. Madrazzo*, 1 Peters, 110, 121; *Montalet v. Murray*, 4 Cr. 46. But see *McNutt v. Bland*, 2 Howard, 9; *Huff v. Hutchinson*, 14 Howard, 586.

of being made the subject of judicial action. Questions relating to the boundaries of the several states are more likely to arise than almost any other species of controversy, and they had arisen both before and at the time of the adoption of the Constitution.¹ Such a case has arisen and been adjudicated since; and the Supreme Court have held that although this clause does not extend the judicial power to *all* controversies between two or more states, yet it in terms excludes none, whatever be their nature or object. Where no exception is made in terms, none is to be made by mere implication. A controversy, therefore, between two states, concerning their respective boundaries, is not excluded by the terms of the Constitution, and it is embraced within the judicial power, if it is a judicial question. Whatever it might be in the case of independent sovereign states, which had not surrendered their right of determination to a common arbiter, as between the states of this Union, which have, by the Constitution, established a judicial power for the determination of their controversies, a question of boundary between them is a judicial question, to be decided like a question of boundary between different tracts of land.²

§ 61. The next class of cases is "controversies between a state and the citizens of another state." It was formerly held, upon great consideration, that this clause imported the surrender by the states of so much of the attribute of sovereignty as might have exempted them from suits by individuals, and authorized suits to be brought *against*, as well as suits to be brought *by* states, where the plaintiff was a citizen of another state.³ To obviate this supposed inconvenience, the eleventh article of the amendments to the Constitution de-

¹ It is well known that the Articles of Confederation provided for the submission of questions of boundary between different states, by Congress. See a learned account of this jurisdiction, in the opinion of the court, delivered by BALDWIN, J., in the case cited *infra*.

² The State of Rhode Island *v.* The State of Massachusetts, 12 Peters, 657.

³ Chisholm *v.* Georgia, 2 Dallas, 478.

clared, that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

§ 62. The object of this amendment has been fully explained by the Supreme Court of the United States. It was not designed to exclude from the judicial power suits brought against a state by one of the other states, or by a foreign state. These are expressly reserved to the judicial power by other clauses of the Constitution, and the language of the amendment obviously includes only suits brought by individuals. The language moreover implies that such proceedings only are within the prohibition, in which an individual undertakes to prosecute some claim or demand against a state in the courts of the United States, by suing out process for the purpose of establishing his claim or demand against it by the judgment of the court;¹ and the question has arisen, whether a writ of error sued out by an individual from the Supreme Court of the United States, to reverse the judgment of a state court in a prosecution instituted by the state against him, where the Supreme Court of the United States would otherwise have jurisdiction on account of the character of the cause, is a suit within the prohibition of this amendment.² Upon this question the Supreme Court held the following reasoning:

"It is a part of our history, that, at the adoption of the Constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted, and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the

¹ *Cohens v. Virginia*, 6 Wheaton, 406.

² *Ibid.*

state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases, and in these a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states.

“The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a state is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a state the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its courts, the Constitution and laws from active violation.

“The words of the amendment appear to the court to justify and require this construction. The judicial power is not ‘to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state,’ &c.

“What is a suit? We understand it to be the prosecution or pursuit of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, ‘the being put in possession of that right whereof the party injured is deprived.’ ‘The instruments whereby the remedy is obtained, are a diversity of suits and actions, which are defined by the Mirror to be “the lawful demand of one’s right.” Or, as Bracton and Fleta express it, in the words of Justinian, *jus proseguendi in judicio quod alieni debetur.*’ Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.

“To commence a suit, is to demand something by the institution of process in a court of justice; and to prosecute the suit is, according to the common acceptance of language, to continue that demand. By a suit commenced by an individual against a state, we should understand process sued out by that individual against the state, for the purpose of establishing some claim against it by the judgment of a court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the action is still the same. Suits had been commenced in the Supreme Court against some of the states before the amendment was introduced into Congress, and others might be commenced before it should be adopted by the state legislature, and might be depending at the time of its adoption. The object of the amendment was not only to prevent the commencement of future suits, but to arrest the prosecution of those which might be commenced when this article should form a part of the Constitution. It, therefore, embraces both objects; and its meaning is, that the judicial power shall not be construed to extend to any suit which may be commenced, or which, if already commenced, may be prosecuted against a state by the citizen of another state. If a suit, brought in one court, and carried by legal process to a supervising court, be a con-

tinuation of the same suit, then this suit is not commenced nor prosecuted against a state. It is clearly in its commencement, the suit of a state against an individual, which suit is transferred to this court, not for the purpose of asserting any claim against the state, but for the purpose of asserting a constitutional defence against a claim made by a state.

“A writ of error is defined to be, a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse the same according to law. If, says my Lord Coke, by the writ of error, the plaintiff may recover, or be restored to anything, it may be released by the name of an action. In Bacon’s Abridgment, tit. Error, L., it is laid down, that ‘where by a writ of error, the plaintiff shall recover, or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea; and when land is to be recovered, or restored in a writ of error, a release of actions real is a good bar; but where by a writ of error the plaintiff shall not be restored to any personal or real thing, a release of all actions, real or personal, is no bar.’ And for this we have the authority of Lord Coke, both in his Commentary on Littleton and in his Reports. A writ of error, is in the nature of a suit or action when it is to restore the party who obtains it to the possession of anything which is withheld from him, not when its operation is entirely defensive.

“This rule will apply to writs of error from the courts of the United States, as well as to those writs in England.

“Under the judiciary act, the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where then, a state obtains a judgment against an individual, and the court, rendering such judgment, overrules a defence set up under the Constitution or laws of the United States, can, with no propriety, we think, be denominated a suit com-

menced or prosecuted against the state whose judgment is so far re-examined. Nothing is demanded from the state. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. Essentially, it is an appeal on a single point, and the defendant who appeals from a judgment rendered against him, is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given rather than an appeal, because it is the more usual mode of removing suits at common law; and because, perhaps it is more technically proper where a single point of law, and not the whole case, is to be re-examined. But an appeal might be given, and might be so regulated as to effect every purpose of a writ of error. The mode of removal is form, and not substance. Whether it be by writ of error, or appeal, no claim is asserted, no demand is made by the original defendant; he only asserts the constitutional right to have his defence examined by that tribunal whose province it is to construe the Constitution and laws of the Union.

“The only part of the proceeding which is in any manner personal, is the citation. And what is the citation? It is simply notice to the opposite party that the record is transferred into another court, where he may appear or decline to appear, as his judgment or inclination may determine. As the party who has obtained a judgment is out of court, and may therefore, not know that his cause is removed, common justice requires that notice of the fact should be given him. But this notice is not a suit, nor has it the effect of process. If the party does not choose to appear, he cannot be brought into court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his non-appearance, but the judgment is to be re-examined, and reversed or affirmed, in like manner as if the party had appeared and argued his cause.

“The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union, has been well illustrated by a reference to the course

of this court in suits instituted by the United States. The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court, where they have, like those in favor of an individual, been re-examined, and affirmed, or reversed. It has never been suggested, that such writ of error was a suit against the United States, and, therefore, not within the jurisdiction of the appellate court.

“It is, then, the opinion of the court, that the defendant who removes a judgment rendered against him by a state court into this court, for the purpose of re-examining the question, whether that judgment be in violation of the Constitution or laws of the United States, does not commence or prosecute a suit against the state, whatever may be its opinion when the effect of the writ may be to restore the party to the possession of a thing which he demands.

§ 63. A state is within the operation of the original clause of the Constitution, only when it is a party to the record, as a plaintiff or defendant, in its political capacity. The Supreme Court have laid it down as a rule admitting of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record.¹ In the case of *Chisholm v. Georgia*, the state was, nominally, a party on the record.² So, also, it was a party on the record in *Hollingsworth v. Virginia*.³ In *Georgia v. Brailsford*, the bill was filed by the governor in behalf of the state, and the case was considered as one in which the Supreme Court had original jurisdiction, because a state was a party.⁴ In *New York v. Connecticut*, both the states were nominally parties.⁵

§ 64. In like manner, a state is within the operation of

¹ *Osborne v. The Bank of the United States*, 9 Wheat. 738.

² 2 Dallas, 419.

³ 3 Dall. 378.

⁴ 2 Dall. 402.

⁵ 4 Dall. 3.

the amendment, only when it is a nominal party on the record, in its political capacity. In *Fowler v. Lindsay*, an attempt was made to restrain proceedings in a cause depending in a circuit court, on the allegation that a controversy respecting the soil and jurisdiction of the two states had occurred in it. The Supreme Court determined that a state, not being a party on the record, nor directly interested, the circuit court ought to proceed in it.¹

§ 65. So, too, if the state merely has an interest in a suit between other persons, or if its rights, powers, privileges, or duties are only brought in question incidentally, or if the actual parties before the court are acting only as its agents, the state is not a party to the controversy. Thus, where a bill was filed by the Bank of the United States, to restrain certain officers of the State of Ohio from collecting a tax attempted to be levied upon the property of the Bank under a law of that state, it was objected that the suit was against the state.²

The Supreme Court said: "The bill is brought, it is said, for the purpose of protecting the Bank in the exercise of a franchise granted by a law of the United States, which franchise the State of Ohio asserts a right to invade, and is about to invade. It prays the aid of the court to restrain the officers of the state from executing the law. It is, then, a controversy between the Bank and the State of Ohio. The interest of the state is direct and immediate, not consequential. The process of the court, though not directed against the state by name, acts directly upon it, by restraining its officers. The process, therefore, is substantially, though not in form, against the state, and the court ought not to proceed without making the state a party. If this cannot be done, the court cannot take jurisdiction of the cause.

"The full pressure of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of

¹ 3 Dall. 411.

² *Osborne v. United States Bank*, 9 Wheaton, 846.

the state in the suit as brought, is admitted; and, had it been in the power of the Bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the state was before the court. But this was not in the power of the Bank. The eleventh amendment of the Constitution has exempted a state from the suits of citizens of other states, or aliens; and the very difficult question is to be decided, whether, in such a case, the court may act upon the agents employed by the state, and on the property in their hands?

“Before we try this question by the Constitution, it may not be time misapplied, if we pause for a moment, and reflect on the relative situation of the Union with its members, should the objection prevail.

“A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts, that the agent of a state, alleging the authority of a law void in itself, because repugnant to the Constitution, may arrest the execution of any law in the United States. It maintains, that if a state shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous penalties, from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties; and the person thus obstructed in the performance of his duty, may indeed resort to his action for damages, after the infliction of the injury, but cannot avail himself of the preventive justice of the nation to protect him in the perform-

ance of his duties. Each member of the Union is capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent, or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.

“These are said to be extreme cases, but the case at bar, had it been put by way of illustration in argument, might have been termed an extreme case; and, if a penalty on a revenue officer, for performing his duty, be more obviously wrong than a penalty on the Bank, it is a difference in degree, not in principle. Public sentiment would be more shocked by the infliction of a penalty on a public officer for the performance of his duty, than by the infliction of this penalty on a Bank, which while carrying on the fiscal operations of the government, is also transacting its own business; but, in both cases, the officer levying the penalty acts under a void authority, and the power to restrain him is denied as positively in the one as in the other.

“The distinction between any extreme case, and that which has actually occurred, if, indeed, any difference of principle can be supposed to exist between them, disappears, when considering the question of jurisdiction; for, if the courts of the United States cannot rightfully protect the agents who execute every law authorized by the Constitution, from the direct action of state agents in the collection of penalties, they cannot rightfully protect those who execute any law.

“The question, then, is, whether the Constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular state to resist the execution of those laws.

“The State of Ohio denies the existence of this power, and contends, that no preventive proceedings whatever, or

proceedings against the very property which may have been seized by the agent of a state, can be sustained against such agent, because they would be substantially against the state itself, in violation of the eleventh amendment of the Constitution.

“That the courts of the Union cannot entertain a suit brought against a state by an alien, or the citizen of another state, is not to be controverted. Is a suit, brought against an individual for any cause whatsoever, a suit against a state, in the sense of the Constitution?

“The eleventh amendment is the limitation of a power supposed to be granted in the original instrument; and to understand accurately the extent of the limitation, it seems proper to define the power that is limited.

“The words of the Constitution, so far as they respect this question, are, ‘The judicial power shall extend to controversies between two or more states, between a state and citizens of another state, and between a state and foreign state, citizens, or subjects.’

- “A subsequent clause distributes the power previously granted, and assigns to the Supreme Court original jurisdiction in those cases in which ‘a state shall be a party.’

“The words of the 11th amendment are, ‘The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of a foreign state.’

“The Bank of the United States contends, that in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party.

“The appellants admit, that the jurisdiction of the court is not ousted by any incidental or consequential interest which a state may have in the decision to be made, but is to be considered as a party where the decision acts directly and immediately upon the state, through its officers.

“If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced, where any person has been considered as a party who is not made so on the record. But the court will not review those decisions, because it is thought a question growing out of the Constitution of the United States, requires rather an attentive consideration of the words of that instrument, than of the decisions of analogous questions by the courts of any other country.

“Do the provisions, then, of the American Constitution, respecting controversies to which a state may be a party, extend, on a fair construction of that instrument, to cases in which the state is not a party on the record?

“The first in the enumeration, is a controversy between two or more states.

“There are not many questions in which a state would be supposed to take a deeper or more immediate interest than in those which decide on the extent of her territory. Yet the Constitution, not considering the state as a party to such controversies, if not plaintiff or defendant on the record, has expressly given jurisdiction in those between citizens claiming lands under grants of different states. If each state, in consequence of the influence of a decision on her boundary, had been considered, by the framers of the Constitution, as a party to that controversy, the express grant of jurisdiction would have been useless. The grant of it certainly proves, that the Constitution does not consider the state as a party in such a case.

“Jurisdiction is expressly granted in those cases only where citizens of the same state claim lands under grants of different states. If the claimants be citizens of different states, the court takes jurisdiction for that reason. Still, the right of the state to grant, is the essential point in dispute; and in that point the state is deeply interested. If that interest converts the state into a party, there is an end of the cause; and the Constitution will be construed to forbid the circuit courts to take cognizance of questions to which it

was thought necessary expressly to extend their jurisdiction, even when the controversy arose between citizens of the same state.

“We are aware that the application of these cases may be denied, because the title of the state comes on incidentally, and the appellants admit the jurisdiction of the court, where its judgment does not act directly upon the property or interests of the state; but we deemed it of some importance to show, that the framers of the Constitution contemplated the distinction between cases in which a state was interested, and those in which it was a party, and made no provision for a case of interest, without being a party on the record.

“In cases where a state is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend, not on this plain fact, but on the interest of the state, what rule has the Constitution given by which this interest is to be measured? If no rule be given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into, and deciding on, the extent of a state's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?

“The next in the enumeration is a controversy between a state and the citizens of another state.

“Can this case arise, if the state be not a party on the record? If it can, the question recurs, what degree of interest shall be sufficient to change the parties, and arrest the proceedings against the individual? Controversies respecting boundary have lately existed between Virginia and Tennessee, between Kentucky and Tennessee, and now exist between New York and New Jersey. Suppose, while such a controversy is pending, the collecting officer of one state should seize property for taxes belonging to a man who supposes himself to reside in the other state, and who seeks redress in the federal court of that state in which the officer resides. The interest of the state is obvious. Yet it is

admitted, that in such a case the action would lie, because the officer might be treated as a trespasser, and the verdict and judgment against him would not act directly on the property of the state. That it would not so act, may, perhaps, depend on circumstances. The officer may retain the amount of the taxes in his hands, and, on the proceedings of the state against him, may plead in bar the judgment of a court of competent jurisdiction. If this plea ought to be sustained, and it is far from being certain that it ought not, the judgment so pleaded would have acted directly on the revenue of the state, in the hands of its officer. And yet the argument admits that the action, in such a case, would be sustained. But, suppose in such a case the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for the specific thing while yet in possession of the seizing officer. It being admitted, in argument, that the action sounding in damages would lie, we are unable to perceive the line of distinction between that and the action of detainee. Yet the latter action would claim the specific article seized for the tax, and would obtain it, should the seizure be deemed unlawful.

“It would be tedious to pursue this part of the inquiry further, and it would be useless, because every person will perceive that the same reasoning is applicable to all the other enumerated controversies to which a state may be a party. The principle may be illustrated by a reference to those other controversies where jurisdiction depends on the party. But, before we review them, we will notice one where the nature of the controversy is, in some degree, blended with the character of the party.

“If a suit be brought against a foreign minister, the Supreme Court alone has original jurisdiction, and this is shown on the record. But, suppose a suit to be brought which affects the interest of a foreign minister, or by which the person of his secretary, or of his servant, is arrested. The minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit, but the actual

defendant pleads to the jurisdiction of the court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the Constitution in the two cases is different. This court can take cognizance of all cases 'affecting' foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes when the enumeration proceeds to states. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national courts jurisdiction over all cases by which they were in any manner affected. In the case of states, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties.

"In proceeding with the cases in which jurisdiction depends on the character of the party, the first in the enumeration is, 'controversies to which the United States shall be a party.'

"Does this provision extend to the cases where the United States are not named in the record, but claim, and are actually entitled to, the whole subject in controversy?

"Let us examine this question.

"Suits brought by the Postmaster-General are for money due to the United States. The nominal plaintiff has no interest in the controversy, and the United States are the only real party. Yet, these suits could not be instituted in the courts of the Union, under that clause which gives jurisdiction in all cases to which the United States are a party; and it was found necessary to give the court jurisdiction over them, as being cases arising under a law of the United States.

"The judicial power of the Union is also extended to controversies between citizens of different states; and it has been decided, that the character of the parties must be shown

on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected that, if the executor be a resident of another state, the jurisdiction of the federal courts could be ousted by the fact, that the creditors or legatees were citizens of the same state with the opposite party. The universally received construction in this case is, that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined, in which the existence of an interest out of the party on the record is more unequivocal than in that which has been just stated. Why, then, is it universally admitted, that this interest in no manner affects the jurisdiction of the court? The plain and obvious answer is, because the jurisdiction of the court depends, not upon this interest, but upon the actual party on the record.

“Were a state to be the sole legatee, it will not, we presume, be alleged, that the jurisdiction of the court, in a suit against the executor, would be more affected by this fact, than by the fact that any other person, not suable in the courts of the Union, was the sole legatee. Yet, in such a case, the court would decide directly and immediately on the interest of the state.

“This principle might be further illustrated by showing that jurisdiction, where it depends on the character of the party, is never conferred in consequence of the existence of an interest in a party not named; and by showing that, under the distributive clause of the second section of the third article, the Supreme Court could never take original jurisdiction, in consequence of an interest in a party not named in the record.

“But the principle seems too well established to require that more time should be devoted to it. It may, we think,

be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the eleventh amendment, which restrains the jurisdiction granted by the Constitution over suits against states, is, of necessity, limited to those suits in which a state is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a state, by the citizens of another state, or by aliens.

“The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.

“In pursuing the arrangement which the appellants have made for the argument of the cause, this question has already been considered. The responsibility of the officers of the state for the money taken out of the Bank, was admitted, and it was acknowledged that this responsibility might be enforced by the proper action. The objection is, to its being enforced against the specific article taken, and by the decree of this court. But, it has been shown, we think, that an action of detinue might be maintained for that article, if the Bank had possessed the means of describing it, and that the interest of the state would not have been an obstacle to the suit of the Bank against the individual in possession of it. The judgment in such a suit might have been enforced, had the article been found in possession of the individual defendant. It has been shown, that the danger of its being parted with, of its being lost to the plaintiff, and the necessity of a discovery, justified the application to a court of equity. It was in a court of equity alone that the relief would be real, substantial, and effective. The parties must certainly have

a real interest in the case, since their personal responsibility is acknowledged, and, if denied, could be demonstrated.

“It was proper, then, to make a decree against the defendants in the Circuit Court, if the law of the State of Ohio be repugnant to the Constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted.”

§ 66. In like manner, where a state has an interest in a corporation, the state is not a party to a suit by or against the corporation, although it has the sole interest, provided other persons are the corporators. Thus, where the United States Bank brought a suit against the Planters' Bank of Georgia, in a circuit court, the Planters' Bank pleaded to the jurisdiction that it was a corporation of which the State of Georgia was a corporator, with certain individuals, citizens of the same state with some of the members of the plaintiff corporation.¹

The Supreme Court said: “Is the State of Georgia a party defendant in this case? If it is, then the suit, had the 11th amendment never been adopted, must have been brought in the Supreme Court of the United States. Could this court have entertained jurisdiction in the case?

“We think it could not. To have given the Supreme Court original jurisdiction, the state must be plaintiff or defendant as a state, and must, as a state, be a party on the record. A suit against the Planters' Bank of Georgia, is no more a suit against the State of Georgia, than against any other individual corporator. The state is not a party, that is, an entire party in the cause.

“If this suit could not have been brought originally in the Supreme Court, it would be difficult to show that it is within the 11th amendment. That amendment does not purport to do more than to restrain the construction, which

¹ *U. S. Bank v. Planters' Bank*, 9 Wheaton, 904.

might otherwise be given to the Constitution; and, if this case be not one of which the Supreme Court could have taken original jurisdiction, it is not within the amendment. This is not, we think, a case in which the character of the defendant gives jurisdiction to the court. If it did, the suit could be instituted only in the Supreme Court. This suit is not to be sustained because the Planters' Bank is suable in the federal courts, but because the plaintiff has a right to sue any defendant in that court, who is not withdrawn from its jurisdiction by the Constitution, or by law. The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The state does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the state holds an interest in it.

"It is, we think, a sound principle, that, when a government becomes a partner in any trading company, it divests itself, so far as it concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union, who have an interest in banks, are not suable even in their own courts; yet they never exempt the corporation from being sued. The State of Georgia, by giving to the Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transaction of the Bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act.

"The government of the Union held shares in the old Bank of the United States; but the privileges of the government

were not imparted by that circumstance to the Bank. The United States was not a party to suits brought by or against the Bank in the sense of the Constitution. So with respect to the present Bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privileges which is not derived from the charter.

“We think, then, that the Planters’ Bank of Georgia, is not exempted from being sued in the federal courts, by the circumstance that the state is a corporator.”¹

§ 67. But where the state is sued and made a party on the record, in its political capacity, the amendment applies: and the Supreme Court have held that the state itself may be considered as a party on the record, when its chief magistrate is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character.²

§ 68. Whether the amendment extends to admiralty proceedings *in rem*, so that on the appearance of a state as claimant, all further proceedings must be stayed, is a point admitting of much doubt. Mr. Justice Story has expressed the opinion, that in such a case, the jurisdiction of the court is founded upon the possession of the thing, and that by interposing a claim, a state would not be before the court merely in the character of a defendant, but as an actor. He has also adverted to the language of the amendment, which is that the judicial power shall not be construed to extend to any suit *in law or equity*, to which a state is a party; and has suggested that a suit in admiralty is not, correctly

¹ 9 Wheaton, 906. See also, *The Bank of the Commonwealth of Kentucky v. Wistar*, 2 Peters, 318.

² *The Governor of Georgia v. Madrazzo*, 1 Peters, 110, 123, 124.

speaking, a suit in law or equity.¹ In the *Governor of Georgia v. Madrazo*, it was considered by the Supreme Court, that the libel was a suit *in personam*, against the state, and not a suit *in rem*; and consequently that it could not be sustained, because it was a case for the original jurisdiction of the Supreme Court. The court, therefore, did not decide the point whether the 11th amendment to the Constitution extends to proceedings in admiralty.²

§ 69. A further question may arise upon this clause of the Constitution, as to the nature of the interest which a state must have when it proceeds as a party plaintiff against the citizens of another state. Is it merely required that the state should be a nominal party to the record, in order to give the courts of the United States jurisdiction, or is it necessary that a substantial interest of the state, and what interest, should appear to be involved? We have seen that it is not enough, in order to bring a case within the restraining operation of the 11th amendment, to show that the state has an incidental or resulting interest in the controversy. If an officer of a state is sued for an act done under its authority, or if a corporation is sued, in which a state is a corporator, the suit may still be maintained, because the state is not a party upon the record, notwithstanding its interest in the controversy. But when the converse of this case occurs, and a state becomes plaintiff, and is thus a party upon the record, proceeding against the citizens of another state, on the ground that it is a controversy between a state and the citizens of another state, it would seem that the interest of the state must be immediate and direct, and not remote or contingent; because the jurisdiction attaches upon the ground that the state is a party, and it seems that the court will look into the nature of the controversy, and ascertain whether the state is entitled to take this attitude. This has been done where the Supreme Court have been called upon to

¹ 3 Story's Commentaries on the Constitution, § 1683. ² 1 Peters, 124.

exercise original jurisdiction, on the ground that a state was a party in a proceeding against citizens of another state; and as such a proceeding can only be had in that jurisdiction, the cases in which it will be exercised will determine the nature or degree of the interest which the state must appear to have, beyond its bare appearance as a party to the record.

§ 70. Thus, where the State of Pennsylvania brought a bill in equity in the Supreme Court, to restrain certain citizens of the State of Virginia from erecting a bridge across the river Ohio, upon the ground, among other things, that by obstructing the navigation of the river, it was an injury to certain public works belonging to the State of Pennsylvania erected within her own limits; the court distinguished the case from a case in which protection might be sought to the interests of *citizens* of the state, or to remote and contingent interests of the state itself, and placed the jurisdiction upon the ground of a direct and immediate interest of the state in the protection of its own property.¹

“As this is the exercise of original jurisdiction by this court, on the ground that the State of Pennsylvania is a party, it is important to ascertain whether such a case is made out as to entitle the state to assume this attitude. In the second section of the third article of the Constitution, it is declared that the Supreme Court shall have original jurisdiction in a case where a state shall be a party.

“In this case the State of Pennsylvania is not a party in virtue of its sovereignty. It does not come here to protect the rights of its citizens. The sovereign powers of a state are adequate to the protection of its own citizens, and no other jurisdiction can be exercised over them, or in their behalf, except in a few specified cases. Nor can the state prosecute this suit on the ground of any remote or contingent interest in itself. It assumes and claims, not an abstract

¹ *State of Pennsylvania v. The Wheeling, &c., Bridge Co., et al.*, 13 Howard, 518, 559.

right, but a direct interest in the controversy, and that the power of this court can redress its wrongs and save it from irreparable injury. If such a case be made out, the jurisdiction may be sustained.

“When a state enters into a copartnership, or becomes a stockholder in a bank or other corporation, its sovereignty is not involved in the business, but it stands and is treated as other stockholders or partners. And so in the present case, the rights asserted and relief prayed, are considered as in no respect different from those of an individual. From the dignity of the state, the Constitution gives to it the right to bring an original suit in this court. And this is the only privilege, if the right be established, which the State of Pennsylvania can claim in the present case.

“It is objected, in the first place, that there is no evidence that the State of Pennsylvania has consented to the prosecution of this suit in its own name.

“This would seem to be answered by the fact, that the proceedings were instituted by the Attorney-General of the State. He is its legal representative, and the court cannot presume, without proof, against his authority. In January, 1850, the following declaration, passed unanimously by both branches of the Pennsylvania Legislature: ‘Whereas, the navigation of the River Ohio has been and is now obstructed by bridges erected across its channel, between Zane’s Island and the main Virginia and Ohio shores, so that steamboats and other water-crafts hitherto accustomed to navigate said river, are hindered in their passage to and from the port of Pittsburg, and other ports in the State of Pennsylvania, and the trade and commerce and business of this commonwealth interrupted, the revenue of her public works diminished and impaired, and steamboats owned and navigated by citizens of this state, bound to and from her ports, are subjected to labor, expense and delay, with hazard to life and property, by reason whereof the said bridges are a common and public nuisance, injurious to the State of Pennsylvania and her citizens; therefore, be it resolved, &c.

“‘2. That the proceedings in behalf of said state, insti-

tuted by her Attorney-General in the Supreme Court of the United States, and now pending therein against the Wheeling and Belmont Bridge Company, to abate the nuisance occasioned by their bridge lately erected across the Ohio, be prosecuted to final judgment, decree, and execution, for abatement of said nuisance.'

"On a question of disputed boundary between two states, although the inquiry of the court is limited to the establishment of a common line, yet the exercise of sovereign authority, over more or less territory, may depend upon the decision. This gives great dignity and importance to such a controversy, and renders necessary a broader view, than on a question as to the mere right of property. But in the present case, the State of Pennsylvania claims nothing connected with the exercise of its sovereignty. It asks from the court protection of its property, on the same ground and to the same extent as a corporation or individual may ask it. And it becomes an important question whether such facts are shown, as to require the extraordinary interposition of this court."

§ 71. In this case, therefore, the State of Pennsylvania was not only the nominal plaintiff upon the record, but it had a direct proprietary interest in certain public works from which it derived revenues, to be protected; and it was upon this ground that the court said it was entitled to assume the attitude of a party. It would seem, therefore, that the court will look into the nature of the controversy, and that the jurisdiction requires not merely that the state should be a nominal party, but that it should have a real, direct, and substantial interest.

§ 72. The next class of cases is "controversies between citizens of different states." This, as has already been observed, is one of the cases where jurisdiction is conferred solely on account of the character, or rather the situation of the parties. And the first question that arises is, who are "citizens of different states," within the meaning of this clause.

§ 73. The term "controversies," as used in this section of the Constitution, is synonymous with civil suits, because it is used with reference to judicial proceedings between party and party. Controversies between citizens of different states, therefore, relate to suits between party and party, where one party is a citizen of one state, and the other party is a citizen of another state. From the fact that the jurisdiction is conferred on account of this relative situation of the parties, it follows that the situation of the parties to the record must determine whether the jurisdiction attaches. Accordingly, it has been determined repeatedly, that the existence of an interest in a party not named in the record, does not oust the jurisdiction, if the parties to the record are citizens of different states. If a suit is brought by or against an executor, the creditors or legatees of his testator are the parties in interest. But if the executor be a citizen of another state from that of the defendant, the jurisdiction of the federal courts is not affected by the fact that the creditors or legatees are citizens of the same state with the opposite party.¹

§ 74. From the circumstance that the courts of the United States are courts of limited, although not of inferior jurisdiction, it follows that it is necessary to allege the jurisdiction in the proceedings. Where the jurisdiction is sought, therefore, upon the ground that the parties are citizens of different states, it is necessary to aver that they are so in the pleadings, otherwise the judgment may be reversed on writ of error for want of such description:² although, until reversed, they are conclusive between parties and privies.³ Where it appears from proper allegations in the proceedings

¹ *Osborn v. The Bank of the U. States*, 9 Wheaton, 856; *Chappedelaine v. Cheneaux*, 4 Cranch, 306; *Childress v. Emory*, 8 Wheat. 668. See further, *McNutt v. Bland*, 2 Howard, 9; *Huff v. Hutchinson*, 14 Howard, 586.

² *Mossman v. Higginson*, 4 Dall. 12; *Course v. Stead*, 4 Dall. 22; *Montalet v. Murray*, 4 Cranch, 46.

³ *McCormick v. Sullivan*, 10 Wheat. 192. See further, *post*.

that the parties who have the real interest sustain the relations necessary to give the courts of the United States jurisdiction, that jurisdiction will not be ousted by the mere joinder or non-joinder of formal parties; but the court will proceed and decide upon the merits of the case, between the parties who have the real interest, when it can be done without prejudice to the rights of others.¹

§ 75. Since the jurisdiction, in the class of cases now under consideration, depends upon the citizenship of the parties, as it is alleged in the record, it follows that the state of the parties at the commencement of the suit fixes the jurisdiction, where there is no change of parties; so that a party cannot, by changing his condition, after the commencement of the suit, affect the question of jurisdiction. If a plaintiff, being a citizen of the same state with the defendant, brings his suit in a court of the United States, he cannot gain jurisdiction in that suit by a subsequent residence in another state. If a defendant is sued as a citizen of a state other than that of the plaintiff, he cannot avoid the jurisdiction by a change of residence. But where, at the commencement of a suit, there are several parties on one side, one of whom has not the character requisite for jurisdiction, while the others have that character, and before the hearing or trial an amendment can properly be made, by striking out such party, the impediment to the exercise of jurisdiction will be removed.²

¹ *Wormley v. Wormley*, 8 Wheaton, 421, 451.

² *Conolly v. Taylor*, 2 Peters, 556, 564. In this case, Mr. Ch. Justice Marshall, delivering the opinion of the court, said:—

“As an objection was made to the jurisdiction of the court in this case, it may be proper, in order to prevent a possible misunderstanding of the principle on which jurisdiction is sustained, briefly to state it.

“The bill is filed in the Court of the United States sitting in Kentucky, by aliens, and by a citizen of Pennsylvania. The defendants are citizens of Kentucky, except one, who is a citizen of Ohio, on whom process was served in Ohio. The jurisdiction of the court cannot be questioned, so far as respects the alien plaintiffs. As between the citizens of Pennsylvania and of Ohio, neither of them being a citizen of the state in which

§ 76. The jurisdiction which we are now examining, in cases between citizens of different states, does not embrace cases where one of the parties is a citizen of a territory, or of the District of Columbia. The language of the Constitution expressly confines the jurisdiction to cases between citizens of different "states;" and it has been held that neither the District of Columbia, nor the territories of the United

the suit was brought, the court could exercise no jurisdiction. Had the cause come on for a hearing in this state of parties, a decree could not have been made in it for the want of jurisdiction. The name of the citizen plaintiff, however, was struck out of the bill before the cause was brought before the court; and the question is, whether the original defect was cured by this circumstance; whether the court, having jurisdiction over all the parties then in the cause, could make a decree.

"The counsel for the defendants maintain the negative of this question. They contend that jurisdiction depends on the state of the parties at the commencement of the suit; and that no subsequent change can give or take it away. They say that if an alien becomes a citizen pending the suit, the jurisdiction which was once vested is not divested by this circumstance. So, if a citizen sue a citizen of the same state, he cannot give jurisdiction by removing himself, and becoming a citizen of a different state.

"This is true; but the court does not understand the principle to be applicable to the case at bar. Where there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition as it was at the commencement of the suit. The court in the first case had complete original jurisdiction; in the last, it had no jurisdiction either in form or substance. But if an alien should sue a citizen, and should omit to state the character of the parties in the bill; though the court could not exercise its jurisdiction while this defect in the bill remained, yet it might, as in every day's practice, be corrected at any time before the hearing, and the court would not hesitate to decree in the cause.

"So in this case. The substantial parties plaintiffs, those for whose benefit the decree is sought, are aliens; and the court has original jurisdiction between them and all the defendants. But they prevented the exercise of this jurisdiction, by uniting with themselves a person between whom and one of the defendants the court cannot take jurisdiction. Strike out his name as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the court possessed, between the alien plaintiffs and all the citizen defendants. We can perceive no objection founded in convenience, or in law, to this course."

States are within this designation. The members of the American confederacy only are the states contemplated in the Constitution.¹

§ 77. As to what constitutes citizenship for the purposes of this jurisdiction, and how it should be pleaded, we shall have occasion to consider hereafter in detail, when we come to treat of the jurisdiction of the Circuit Courts. At present, it may be said, in general, that any citizen of the United States, residing in a particular state, is, for this purpose, a citizen of that state;² and it has been held, that where an individual has resided in a state for a considerable time, being engaged in the prosecution of business, he may well be presumed to be a citizen of such state, unless the contrary appear. This principle is strengthened when the party lives upon and cultivates property, which he claims as his own. On a change of domicil, from one state to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage has been said to be conclusive on the subject; but acquiring a right of suffrage, accompanied by acts, which show a permanent location, unexplained, may be sufficient.³

§ 78. We have seen that in order to sustain this jurisdiction between citizens of different states, it is necessary to set forth the facts and circumstances which give jurisdiction.⁴ This must be done by express averment, or else the facts must be set forth in such manner as to render them certain by legal intendment.⁵ The citizenship of both parties, plaintiff and defendant, must be set forth, otherwise the omission will be fatal, at any stage of the cause, unless cured by an

¹ *Hepburn v. Elzey*, 2 Cranch, 445; *The Corporation of New Orleans v. Winter*, 1 Wheaton, 91.

² *Gassies v. Ballou*, 6 Peters, 761.

³ *Shelton v. Tiffin*, 6 Howard, 163, 185.

⁴ *Ante*, § 73, 74.

⁵ *Turner v. The Bank of North America*, 4 Dall. 8.

amendment.¹ If the suit is brought upon an instrument by an assignee thereof, and the court has jurisdiction only where it would have it as between the original parties, it is necessary to aver that the assignor might have maintained a suit in his own name.² But the necessary facts of citizenship may be gathered from any part of the record ; and a recital that the parties were citizens of the same state, in the commencement of a declaration, may be cured by subsequent averments of alienage or citizenship in another state.³

§ 79. The Constitution, it has been seen, confers the jurisdiction only in cases between *citizens* of different states ; and the question arises, whether corporations can in any, and in what way, become parties to suits in the courts of the United States, by virtue of this clause. Formerly, the doctrine in relation to corporations was, that a corporation aggregate was not a "citizen" within the meaning of this clause of the Constitution ; but that the members of a corporation might sue, or be sued, in their corporate name, under a proper allegation that they were all citizens of some state other than that of which the opposite party was a citizen.⁴ But this doctrine has since been reversed, and it has been held, that a corporation created by, and transacting business in a state, is to be deemed an inhabitant of the state, capable of being treated as a citizen, for all purposes of suing and being sued, and an averment of the facts of its creation and the place of transacting its business, is sufficient to bring it within the jurisdiction.⁵ But the law on this subject cannot at present be considered as settled.

¹ *Sullivan v. The Fulton Steamboat Co.*, 6 Wheaton, 450.

² *Turner v. The Bank of North America*, 4 Dall. 8 ; *Montalot v. Murray*, 4 Cranch, 46.

³ *Bailey v. Dozier*, 6 Howard, 23.

⁴ *Strawbridge v. Curtis*, 3 Cranch, 267 ; *Bank of the United States v. Deveaux*, 5 Cranch, 61-84 ; *The Hope Ins. Co. v. Boardman*, 5 Cranch, 57 ; *The Commercial and Railroad Bank of Vicksburg v. Slocumb*, 14 Peters, 60.

⁵ *Louisville Railroad Co. v. Letson*, 2 Howard, 497, 555.

§ 80. The next class of cases subjected to the judicial power of the United States is, "controversies between citizens of the same state claiming lands under grants of different states." The object of this clause was, to secure an impartial tribunal for the decision of causes arising from the grants of different states. It was supposed that a state tribunal might not stand indifferent in a controversy where the claims of its own sovereign were in conflict with those of another sovereign. It had no reference to the antecedent situation of the territory, whether included in one sovereignty or another. It simply regarded the fact, whether the grants arose under the same state or under different states.¹ Accordingly, cases of grants made by different states are within the jurisdiction, notwithstanding one of the states was originally part of the other.² It is the grant which passes the legal title, and if the controversy is founded upon the conflicting grants of different states, the judicial power of the United States extends to the case, whatever may have been the equitable title of the parties prior to the grant.³

§ 81. The last class of cases consists of "controversies between a state, or the citizens thereof, and foreign states, citizens, or subjects." The object of this provision was to give the cognizance of controversies, in which foreign states, or individual foreigners, are parties, to the national judiciary. The controversies between a foreign state and a state of this Union, which are contemplated by this clause, must of course be such as can be submitted to judicial cognizance. The controversies in which individuals are concerned must be those between an alien and a state, or a citizen, of the United States. If the party to the record be an alien, he is within this clause, whether he sues in his own right, or as a trustee, if he have a substantial interest as a trustee;⁴ and

¹ *Town of Pawlet v. Clarke*, 9 Cranch, 292.

² *Ibid.*

³ *Colson v. Lewis*, 2 Wheat. 377.

⁴ *Chappelaine v. De Cheneaux*, 4 Cranch, 306.

if the nominal plaintiff, although a citizen, sues for the use of an alien, who is the real party in interest, the case is within the jurisdiction.¹ A foreign corporation, all of whose members are aliens, is an alien for this purpose.² But in all these cases, the opposite party must be a citizen, and this must appear from the record.³

¹ *Brown v. Strobe*, 5 Cranch, 303.

² *Society for Propagating the Gospel v. The Town of New Haven*, 8 Wheaton, 464. *Quere*, whether it would now be necessary, in the case of a foreign corporation, that all its members should be aliens, since the decision in *Louisville Railroad Company v. Letson*, 2 Howard, 497.

³ *Jackson v. Twentyman*, 2 Peters, 136.

CHAPTER VI.

WHAT CONSTITUTES JUDICIAL POWER.

§ 82. WE now come to the very interesting and important question: What constitutes the exercise of judicial power, within the meaning of the Constitution?

§ 83. The language of the Constitution, which creates and defines the power of the judicial department, establishes a limited and not a general jurisdiction. The objects upon which that jurisdiction is to be exercised are described in two general classes, as "cases" and "controversies." In the first class are comprehended "all cases in law and equity, arising under the Constitution, laws, or treaties of the United States," "all cases affecting ambassadors, other public ministers and consuls," and "all cases of admiralty and maritime jurisdiction." In the latter class are embraced "controversies" between parties particularly described, and one "controversy" where the parties and the subject-matter are also particularly designated. The term, "cases," however, is applied as a generic term to all these objects, in that clause of the 3d article, which distributes the original and appellate jurisdiction of the Supreme Court. From this phraseology, it is apparent that the objects on which the judicial power is to be exerted, are those proceedings, civil or criminal, arising under the circumstances limited by the terms of the Constitution, which, in their nature and form, are capable of being submitted to judicial action. The term "case" has received a judicial construction, which affixes to it this limitation, namely, that where the subject on which action is invoked, has assumed such a form that judicial

power is capable of acting upon it, it becomes a "case" within the meaning of the Constitution.¹ So, too, the terms, "cases in law and equity," have been held to contemplate those judicial proceedings in which legal or equitable rights between party and party are to be ascertained in courts of justice, according to the forms peculiar to a legal or equitable jurisdiction.² The term, "case," therefore, as used in the Constitution, is of limited signification. It is a controversy between parties, which has taken a shape for judicial decision. To come within this description, a question must assume a legal form, for forensic litigation and judicial decision.³

§ 84. It is to be observed, also, in this connexion, that the Constitution has established an executive and a legislative, as well as a judicial department; that to each of these departments it has assigned distinct powers and duties, and from their distinct functions and the objects committed to them, the maxim is derived, which forbids each of them to encroach upon the powers of either of the others.⁴ Each of these departments exercises its powers and functions upon objects which arise under, or are called into existence by the Constitution, laws, or treaties of the United States. The duty of the executive is prescribed by the Constitution, or by laws or treaties made in pursuance of its provisions. The powers of the legislative branch extend to all matters of

¹ *Osborne v. The Bank of the United States*, 9 Wheaton, 738, 819.

² *Robinson v. Campbell*, 3 Wheat. 212, 221; *Parsons v. Bedford*, 3 Peters, 433, 446, 447.

³ See the argument of Ch. J. Marshall, in the House of Representatives (March, 1800), on the case of Jonathan Robbin. *Annals of Congress*, 6th Congress, p. 596, 606, 618. (Washington: Gales and Seaton, 1851.)

⁴ The Constitution of the United States has placed the power of recognising a State government in the hands of Congress. The question, therefore, whether a particular Constitution has been established in any State, is a question for the political, and not for the judicial department of the government. *Luther v. Borden*, 7 Howard, 1.

legislation, that grow out of the exercise of the powers which the Constitution has conferred upon the general government. It is obvious, therefore, that whether the determination of a particular question belongs to the one or the other of these three departments, is a matter which cannot be concluded by the single circumstance, that it arises under, or grows out of the Constitution, laws, or treaties of the United States. There may, for instance, be a question which arises under a treaty, but which it may belong exclusively to the executive to determine; as, where the treaty requires a particular act to be done by the government, and the question is, whether the *casus fœderis* has arisen. So, too, there may be a question arising under a law of the United States, which may belong wholly to the executive or legislative branch of the government, according to the directions of Congress; as where a law directs a sum of money to be paid to certain claimants, or a patent for land to be issued, or letters-patent to be granted, and the question is, whether the party claiming has satisfied the requisitions of the law. So, too, a question might arise, whether a foreign minister should be permitted to maintain his official connexion with the government; and this, in one sense, would constitute "a case" by which such a minister would be deeply "affected;" but no one would doubt that such a question belonged exclusively to the executive. So, too, a question might arise under the Constitution, which would be for legislative determination, in the first instance, and until a controversy between parties had brought it before a judicial tribunal; as is the case whenever Congress exercises the legislative powers conferred upon it by the Constitution.

§ 85. The circumstance that questions of fact, or questions of law, are to be determined in the discharge of a particular duty, or the exercise of a particular function, has no necessary tendency to show that the duty or function is to be discharged by the judiciary. In the discharge of both executive and legislative duties, questions of law and of fact must

often be determined; but it does not follow that they are to be determined in a court of judicature. Such questions may even be judicial in their nature; that is to say, they may involve judgment and discretion and require the finding of facts, and the ascertaining of the law that is to be applied to them; but the power under which this is done, may still be distinct from the judicial power granted by the Constitution to the courts of the United States.¹

§ 85 a. From these considerations, it appears that there is a broad distinction between the "*cases*" which the Constitution assigns to the judicial power, and *questions* which may arise for determination in the course of executive or legislative action. For example, the Constitution includes within the judicial power "all cases arising under the Constitution, laws, or treaties of the United States:" but this cannot, as we have seen, embrace all questions arising under the Constitution, or a law, or a treaty. In like manner, although the judicial power extends to "all cases affecting ambassadors," it is obvious that this expression cannot be designed to submit to the action of courts all questions by which an ambassador may be affected. Some limitation, therefore, to the general expressions employed in the Constitution, is to be sought for in the nature of judicial power, and in the powers and duties of the other departments of the government;² and from these, it is apparent, that in order to make

¹ Argument of Ch. J. Marshall, *ub supr.* *The United States v. Ferreira*, 13 Howard, 40, 48.

² Mr. Madison foresaw this distinction when the Constitution was formed. In the Federal Convention, the clause which defines the judicial power being under consideration, Dr. Johnson moved to insert the words "this Constitution and the," before the word "laws." Mr. Madison doubted whether it was not going too far, to extend the jurisdiction of the court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a *judiciary nature*. The right of expounding the Constitution in cases not of this nature ought not to be given to that department. The motion of Dr. Johnson was agreed to *nem. con.*, it being generally supposed that the jurisdiction given was constructively limited to cases of a *judiciary nature*. (Madison's Debates in the Federal Convention, Elliot, V. 483.)

a case for judicial action, there must be parties to come into court, who can be reached by its process and be bound by its power ;—parties, whose rights admit of ultimate decision by a tribunal to which they are bound to submit ; and also, that the question to be acted upon should be capable of final determination in the judicial department of the government, without the revision or control of either the executive or the legislature.¹

§ 86. These principles may now receive further illustration by the examination of particular questions, which may arise in the execution of various provisions of law or treaty. A case in law or equity, proper for judicial decision, may arise under a treaty, where the rights of individuals acquired or secured by a treaty are to be asserted or defended in court. On the other hand, a case of extradition under a treaty, whether of persons or property, may have no element of a judicial question, in the sense of the judicial power of the Constitution, and may belong wholly to the executive, according to the particular stipulations of the treaty, or the provisions of law by which the treaty has been carried into effect.

§ 87. In the year 1799, a requisition was addressed by the British minister at Washington, to the President of the United States, for the extradition of a British seaman named Thomas Nash, charged with the commission of murder and piracy on board a British vessel of war. The requisition was made under the 27th article of the Treaty of Amity and Commerce with Great Britain, which stipulated, that on mutual requisitions by the King and the United States respectively, or by their respective ministers or officers authorized to make the same, all persons, who, being charged with murder or forgery, committed within the jurisdiction of either, should seek an asylum within any of the countries of the other, should be delivered up to justice, provided that this

¹ Ibid.

should only be done on such evidence of criminality, as, according to the laws of the place where the fugitive should be found, would justify his apprehension and commitment for trial, if the offence had there been committed.¹

§ 88. Nash had previously been committed to jail, in Charleston, S. C., at the instance of the British Consul, on suspicion of his having committed the crime with which he was charged, under a warrant issued by the district judge, who had declined to deliver him up, without a requisition having been made upon the President by the British minister. The President, on receipt of the requisition, caused a communication to be made to the Judge, by the Secretary of State, conveying his (the President's) "advice and request," that on the production of such evidence as was contemplated by the treaty, Nash should be delivered up. This was accordingly done, and Nash was tried by a court martial of the British navy, convicted, and executed. While detained in jail in Charleston, Nash had assumed the name of Jonathan Robbins, and claimed to be an American citizen; but this was satisfactorily disproved, before he was delivered up to the British authorities, and again upon his trial.

§ 89. Partly in consequence of this claim, and partly in consequence of the opinion formed by some persons that Nash had been committed for trial in the District Court for the South Carolina District, and was properly triable there, the conduct of the executive was arraigned in Congress, as an unwarrantable interference with the judiciary, and a dictation to the court upon the question, whether his offence was committed within the jurisdiction of the British crown, of which question, it was said, the court making the commitment alone had cognizance. In the course of the discussions to which the case gave rise in Congress, Chief Justice Marshall, then a member of the House of Representatives, de-

¹ Treaty with Great Britain, 1794; Statutes at Large, vol. 8, p. 116, 129.

livered an elaborate argument, which set the whole matter at rest, and which, although not to be cited as authority, is of great value upon this whole class of cases.

§ 90. He proceeded in the first place to show that a murder, or an act of piracy, committed upon the high seas on board a British vessel, was committed within the exclusive jurisdiction of the British crown, and was not triable at all in the courts of the United States. He distinguished between piracy under the law of nations, which is an offence against all nations, and is therefore punishable by all, and piracy against the particular nation on board of whose vessel it is committed. As the offence was of the latter character, it was clearly not triable in the courts of the United States, and therefore Nash was not committed for trial by the district judge in South Carolina. Having established this point, he next proceeded to show, that the question of whether the *casus fœderis* had arisen, requiring the surrender of the fugitive, was, under the 27th article of the treaty, exclusively a case for executive cognizance, and not within the cognizance of the judiciary.

§ 91. The doctrine which he laid down was, that the treaty was a political compact between the two nations; that when a demand was made under it, it was in its nature a national demand made upon the nation; that the parties were, therefore, the two nations, who could not come into court to litigate their claims, nor could a court decide upon them. Consequently, the demand was not a case for judicial cognizance. But, as the demand was made by a foreign nation for the performance of a national act, it must be addressed to the President, who is the sole organ of the nation in its intercourse with foreign powers, and must be performed by him, as the executive agent of the nation.

§ 92. In the course of this argument, Mr. Marshall took a distinction between the 27th article of the Treaty with

Great Britain, and the 9th article of the Consular Convention with France, which related to the apprehension of deserters, and which was in these words: "The consuls and vice-consuls may cause to be arrested the captains, officers, mariners, sailors, and all other persons, being part of the crews of the vessels of their respective nations, who shall have deserted from the said vessels, in order to send them back and transport them out of the country: for which purpose the said consuls and vice-consuls *shall address themselves to the courts, judges, and officers competent*, and shall demand the said deserters in writing, proving, by an exhibition of the registers of the vessel or ship's roll, that those men were part of the said crews; and on this demand so proved (saving, however, where the contrary is proved), the delivery shall not be refused; and there shall be given all aid and assistance to the said consuls and vice-consuls for the search, seizure, and arrest of the said deserters, who shall even be detained and kept in the prisons of the country, at their request and expense, until they shall have found an opportunity of sending them back; but if they be not sent back within three months, to be counted from the day of their arrest, they shall be set at liberty, and shall be no more arrested for the same cause."¹

§ 93. "This article of the Convention," said Mr. Marshall, "does not, like the 27th article of the Treaty with Britain, stipulate a national act, to be performed on the demand of a nation; it only authorizes a foreign minister to cause an act to be done, and prescribes the course he is to pursue. The contract itself is, that the act shall be performed by the agency of the foreign consul, through the medium of the courts; but this affords no evidence that a contract of a very different nature is to be performed in the same way."² These distinctions are obviously sound; but they do not

¹ Statutes at Large, vol. 8, p. 112. Consular Convention with France, 14th Nov., 1788, art. 9.

² Annals of Congress, *ut. supr.*, p. 603.

sufficiently explain how the courts of the United States could have the jurisdiction in the one case, which it was contended they had not in the other. A treaty cannot confer jurisdiction on the courts of the United States; the judicial power is defined by the Constitution, and cannot be enlarged or diminished by the legislature or the treaty-making power. A treaty may, however, stipulate by what person the action of the courts shall be invoked, in cases within their constitutional jurisdiction; and if that jurisdiction is capable of embracing any controversies in which foreigners alone are concerned, a treaty may stipulate that it shall act upon them. Now, desertion from the mariners' contract of service is a case of general admiralty jurisdiction. There are many cases of contract and quasi-contract, known to the *jus gentium*, of which courts of admiralty will take cognizance, even where the parties are foreigners, especially where their own sovereign, or his representative, to use the expression of Sir W. Scott, "devolves the jurisdiction on the court," that is to say, where he signifies that he interposes no objection to its exercise, or actually invokes it.¹ Desertion is one of these cases; it is a breach of contract, of which courts of admiralty will take cognizance even between foreigners, and will enforce the remedy, known to the general maritime law, of arrest, detention, and extradition, if the sovereign of the parties does not oppose, or directly stipulates for, their interposition. When, therefore, the Convention with France provided that the consuls should address themselves to the "courts competent," for the arrest and delivery of deserters, it stipulated for the action, at the instance of a consul, of the proper admiralty tribunals, in a case of general admiralty jurisdiction, and gave the consent

¹ See *The See Reuter*, 1 Dodson's Adm. R. 22; *The Madonna D'Ibra*, 1 Dods. 37; *The Vrow Mina*, 1 Dods. 234; *The Frederick*, 1 Dods. 266; *The Salacia*, 2 Haggard, 262; *The Calypso*, 2 Haggard, 209; *The Courtney*, Edwards' Adm. R. 239; *The Antelope*, 9 Wheaton, 66; *The Jerusalem*, 2 Gallis. 191; *Mason v. Ship Blaireau*, 2 Cranch, 240; *Hudson v. Guestier*, 4 Cranch, 293.

of the sovereign to the exercise of that jurisdiction over his own subjects. The courts of the United States, therefore, possessed jurisdiction of the case, before the convention, which merely removed all obstacles to its exercise, and designated the officer who was to make himself a party to the proceedings. It is manifest, that the convention did not undertake to deal with the offence as a crime, and it is not properly to be cited as an instance of the extradition, under a treaty, of fugitives charged with crime. It simply provided that the deserters should be sent back to their own country; but for what punishment, or whether for trial, or for what purpose, it was wholly silent; and, considering the nature of the offence, the presumption is, that the convention intended to deal only with a case of breach of contract, cognizable even in foreign courts of admiralty, where the sovereign of the parties chooses to have his subjects subjected to the jurisdiction.

§ 94. But this is a very different case, from that of a treaty stipulation, which provides that foreign fugitives, charged with a particular crime against their own sovereign, shall, on demand of that sovereign, or his representative, be delivered up to justice, or for trial. Whether such crime be committed on the land or the sea, if it is an offence against the foreign sovereign only, and is not punishable under the law of nations, the courts of the United States can have no jurisdiction to arrest, still less to try the offender; and if they have no jurisdiction over the subject-matter, it is difficult to perceive how the act and duty of extradition can belong to the judicial power, or be anything but an executive act, to be performed by the executive on the demand of the foreign sovereign.

§ 95. That the judicial officers of the United States may be called upon to act, to a certain extent, in these cases, by a special direction of law, or by a stipulation in the treaty, which requires them to arrest and examine the fugitive, and

to certify to the executive the sufficiency of the evidence, has no tendency to show that the case of extradition under a treaty belongs to the judicial power. Whether the extradition is an executive or a judicial act, must depend upon the question whether an act stipulated to be done by the nation, for and with another nation, is one of the "cases" committed by the Constitution to the judicial power. If it is not, the circumstance that the judicial officers of the United States are called upon, by the treaty or by statute, to make an inquiry preliminary to the performance of that act, cannot alter the character of the act itself. This inquiry may be instituted under a complaint made by and in the name of the United States, averring the commission of the crime, and asking for an investigation, because of the provisions of the treaty. But this inquiry is only an incident to the act to be done under the treaty, which is an act between the two nations; and unless the executive institutes a proceeding, which is the commencement of its action under the treaty, it is difficult to see how the judicial department, or the magistrates of the United States, can acquire authority to act.¹

§ 96. The nature and scope of judicial power may be

¹ This question arose recently under the treaty with Great Britain, in the case of Kaine, a fugitive from Ireland, in which the proceedings were commenced by the British Consul, without application to the President of the United States, by complaint made to a commissioner of the Circuit Court of the United States for the Southern District of New York. After the decision of the commissioner, committing the prisoner to abide the order of the President, a petition was presented to the circuit judge, addressed to the Justices of the Supreme Court of the United States, praying for a writ of *habeas corpus* to discharge the prisoner; which petition was adjourned by the circuit judge into the Supreme Court. Mr. Justice Catron, Mr. Justice M'Lean, Mr. Justice Wayne, and Mr. Justice Grier, held that the commissioners of the United States are authorized to act in these cases without the previous action of the executive. Mr. Ch. Justice Taney, Mr. Justice Daniel, and Mr. Justice Nelson, held the contrary. Mr. Justice Curtis, gave no opinion upon this question, being of opinion that the court had no jurisdiction to issue the writ. In *Re Kaine*, 14 Howard, 103.

further illustrated, by other cases which have arisen under Acts of Congress. The Act of Congress of March 23, 1792, ch. xi., undertook to confer upon the Circuit Courts of the United States jurisdiction to hear and determine upon the claims to invalid pensions by parties who had served in the war of the Révolution. It directed the court, upon the receipt of certain proofs to be offered by the applicant, to examine into the wound or other cause of disability, and having ascertained the degree thereof, to certify the same, and transmit the result of their inquiry, in case they were satisfied that the applicant ought to be put upon the pension list, to the Secretary at War, together with their opinion in writing, what proportion of the monthly pay of such applicant would be equivalent to the degree of disability so ascertained. For the purpose of receiving these applications, it directed the judges of the Circuit Courts, for the space of two years after the passing of the act, to remain at the places where the courts were by law to be held, five days at least from the opening of the sessions thereof, that persons disabled might have full opportunity to apply. The Secretary at War, upon receipt of such proofs, certificate and opinion, was to cause the same to be duly filed in his office, and to place the name of the applicant upon the pension list, in conformity thereto, *provided*, that in any case where he should have cause to suspect imposition or mistake, he should have power to withhold the name of the applicant from the pension list, and make report of the same to Congress at its next session.¹

§ 97. When this act first went into operation, the judges of all the circuits held, that the duty imposed, when the decision was subject to the revision of a Secretary, and of Congress, could not be executed by the court as a judicial power; but some of them construed the act as conferring the power on the judges personally as commissioners, and executed it accordingly. The act, however, was repealed, at the next session of Congress; and a suit was brought, in the name of

¹ Act of March 23, 1792, ch. xi. § 2, 3, 4.

the United States, to recover back the amount of a pension which had been paid on a certificate granted by the judges of the New York Circuit, acting as commissioners, for the purpose of testing the question, whether the judges could so act under the law. In this suit, the Supreme Court of the United States rendered judgment in favor of the United States for the sum claimed. It appears, therefore, to have been the opinion of the Supreme Court: 1. That the power proposed to be conferred on the Circuit Courts of the United States by the act of 1792, was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the court. 2. That as the Act of Congress intended to confer the power on the courts as a judicial function, it could not be construed as an authority to the judges composing the court to exercise the power out of court in the character of commissioners.¹

§ 98. In like manner, the Supreme Court of the United States have very recently held, that an Act of Congress providing for the adjustment of claims under a treaty, although it designated a judge of one of the courts of the United States as the adjudicating officer, did not confer judicial power, but made the judge a commissioner. The facts were these: The Treaty of 1819, by which Spain ceded Florida to the United States, contained the following stipulation: "The United States shall cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida." Successive Acts of Congress were passed to provide for the adjustment of these claims, and were duly executed, until, in 1849, a special law was passed, authorizing the District Judge of the United States for the Northern District of Florida, to receive and adjudicate certain of these claims, under the provisions of the

¹ See the note, by Mr. Chief Justice Taney, to the opinion of the court in the *U. S. v. Ferreira*, 13 Howard, 40, 52; and *Hayburn's case*, 2 Dallas, 409.

former acts.¹ Florida had become a state of the Union in 1849, and therefore the district judge was substituted in place of the territorial judges. The former act, of March 3, 1823, ch. xxxv., authorized and directed the judges of the Superior Courts established at St. Augustine and Pensacola to receive and adjust all claims, &c., agreeably to the provisions of the treaty; and it directed "that in all cases where the judges shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be by the said judges reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged."² One Ferreira had obtained the decision of the district judge in favor of his claim, and the District Attorney of the United States, who had intervened in the proceedings, took an appeal to the Supreme Court of the United States. The court held that the proceeding was not a judicial one; that the judge acted as a commissioner; and that no appeal lay from his decision.³

¹ 3 Stat. at Large, 768; 6 Stat. at Large, 569; Stat. at Large, 788.

² Act March 3, 1823, ch. 35, *ut supra*.

³ The United States v. Ferreira, 13 Howard, 40. In this case, Mr. Chief Justice Taney, delivering the opinion of the court, said, "The only question now before us, is whether we have any jurisdiction in the case. And in order to determine that question, we must examine the nature of the proceeding before the district judge, and the character of the decision from which this appeal has been taken.

"The treaty certainly created no tribunal by which these damages were to be adjusted, and gives no authority to any court of justice to inquire into or adjust the amount which the United States were to pay to the respective parties who had suffered damage from the causes mentioned in the treaty. It rested with Congress to provide one, according to the treaty stipulation. But when that tribunal was appointed, it derived its whole authority from the law creating it, and not from the treaty, and Congress had the right to regulate its proceedings and limit its power, and to subject its decisions to the control of an appellate tribunal, if it deemed it advisable to do so.

"Undoubtedly Congress was bound to provide such a tribunal as the

§ 99. It is to be observed, that in both of these cases, the decision of the officer adjudicating in the first instance, was

treaty described. But if they failed to fulfil that promise, it is a question between the United States and Spain. The tribunal created to adjust the claims cannot change the mode of proceeding or the character in which the law authorizes it to act, under any opinion it may entertain that a different mode of proceeding, or a tribunal of a different character, would better comport with the provisions of the treaty. If it acts at all, it acts under the authority of the law, and must obey the law.

"The territorial judges, therefore, in adjusting these claims, derived their authority altogether from the laws above mentioned, and their decisions can be entitled to no higher respect or authority than these laws gave them. They are referred by the act of 1823 to the treaty for the description of the injury which the law requires them to adjust, but not to enlarge the power which the law confers, but to change the character in which the law authorizes them to act.

"The law of 1823, therefore, and not the stipulations of the treaty, furnishes the rule for the proceeding of the territorial judges, and determines their character. And it is manifest that this power to decide upon the validity of these claims, is not conferred on them as a judicial function, to be exercised in the ordinary forms of a court of justice, for there is to be no suit, no parties, in the legal acceptance of the term are to be made, no process to issue, and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*; and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain, but neither the evidence nor his award are to be filed in the court in which he presides, nor recorded there, but he is required to transmit both the decision and the evidence upon which he decided, to the Secretary of the Treasury, and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge. It is too evident for argument on the subject that such a tribunal is not a judicial one, and that the Act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, and their respective jurisdictions, are referred to in the law merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice, it is the award of a commissioner. The act of 1834 calls it an award. And an appeal to this court from such a decision, by such an authority from the judgment

to be revised, not by an appellate judicial tribunal, but by another department of the government. This circumstance

of a court of record, would be an anomaly in the history of jurisprudence. An appeal might as well have been taken from the awards of the board of commissioners, under the Mexican treaty, which were recently sitting in this city.

“Nor can we see any ground for objection to the power of revision and control given to the Secretary of the Treasury. When the United States consents to submit the adjustment of claims against them to any tribunal, they have a right to prescribe the conditions on which they will pay. And they had a right, therefore, to make the approval of the award by the Secretary of the Treasury, one of the conditions upon which they would agree to be liable. No claim, therefore, is due from the United States until it is sanctioned by him; and his decision against the claimant for the whole or a part of a claim as allowed by the judge, is final and conclusive. It cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an Act of Congress. It is said, however, on the part of the claimant, that the treaty requires that the injured parties should have an opportunity of establishing their claims by a process of law; that process of law means a judicial proceeding in a court of justice; and that the right of supervision given to the secretary, over the decision of the district judge, is therefore a violation of the treaty.

“The court thinks differently, and that the government of this country is not liable to the reproach of having broken its faith with Spain. The tribunals established are substantially the same with those usually created, where one nation agrees by treaty to pay debts or damages which may be found to be due to the citizens of any other country. This treaty meant nothing more than the tribunal and mode of proceeding ordinarily established on such occasions, and well known and well understood when treaty obligations of this description are undertaken. But if it were admitted to be otherwise, it is a question between Spain and that department of the government which is charged with our foreign relations, and with which the judicial branch has no concern. Certainly the tribunal which acts under the law of Congress, and derives all its authority from it, cannot call in question the validity of its provisions, nor claim absolute and final power for its decisions, when the law by virtue of which the decisions are made declares that they shall not be final, but subordinate to that of the Secretary of the Treasury, and subject to his reversal.

“And if the judicial branch of the government had the right to look into the construction of the treaty in this respect, and was of opinion that it required a judicial proceeding, and that the power given to the secretary was void as in violation of the treaty, it would hardly strengthen

was regarded as decisive of the character of the proceeding. But both cases also possessed another feature, which is equally

the case of the claimant on this appeal, for the proceedings before the judge are as little judicial in their character, as that before the secretary. And if his decisions are void on that account, the decisions of the judge are open to the same objections, and neither the principal nor interest, nor any part of this claim, could be paid at the treasury. For if the tribunal is unauthorized, the awards are of no value.

“The powers conferred by these Acts of Congress upon the judge, as well as the secretary, are, it is true, judicial in their nature, for judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a secretary, as well as on a commissioner. But it is not judicial in either case in the sense in which judicial power is granted by the Constitution to the courts of the United States.

“The proceeding we are now considering did not take place before one of the territorial judges, but before a district judge of the United States. But that circumstance can make no difference. For the act of 1849 authorizes him to receive and adjudicate the claims of the persons mentioned in the law, under the act of 1834; and provides that these claims may be settled by the treasury, as other cases under the said act. It conferred on the district judge, therefore, the same power, and the same character, and imposed on him the same duty that had been conferred and imposed on the territorial judges before Florida became a state. It would seem, indeed, in this case, that the district judge acted under the erroneous opinion that he was exercising judicial power, strictly speaking, under the Constitution, and has given to these proceedings as much of the form of proceedings in a court of justice as was practicable. A petition in form is filed by the claimant; and the judge states, in his opinion, that the district attorney appeared for the United States, and argued the case, and prayed an appeal. But the Acts of Congress require no petition. The claimant had nothing to do but to present his claim to the judge, with the vouchers and evidence to support it. The district attorney had no right to enter an appearance for the United States, so as to make them a party to the proceedings, and to authorize a judgment against them. It was, no doubt, his duty as a public officer, if he knew of any evidence against the claim, or of any objection to the evidence produced by the claimant, to bring it before the judge, in order that he might consider it, and report it to the secretary. But the Acts of Congress certainly do not authorize him to convert a proceeding

decisive against the judicial character of such an adjudication; and that is, that there were not two parties to contest

before a commissioner into a judicial one, nor to bring an appeal from his award before this court.

"The question as to the character in which a judge acts in a case of this description is not a new one. It arose as long ago as 1792, in Heyburn's case, reported in 2 Dall. 409.

"The act of 23d of March, in that year, required the circuit courts of the United States to examine into the claims of the officers and soldiers and seamen of the Revolution, to the pensions granted to invalids by that act, and to determine the amount of pay that would be equivalent to the disability incurred, and to certify their opinion to the secretary of war. And it authorized the secretary, when he had cause to suspect imposition or mistake, to withhold the pension allowed by the court, and to report the case to Congress at its next session. The authority was given to the circuit courts; and a question arose whether the power conferred was a judicial one, which the circuit courts, as such, could constitutionally exercise.

"The question was not decided in the Supreme Court in the case above mentioned. But the opinions of the judges of the circuit courts for the districts of New York, Pennsylvania, and North Carolina, are all given in a note to the case by the reporter.

"The judges in the New York circuit, composed of Chief Justice Jay, Justice Cushing, and Duane, district judge, held that the power could not be exercised by them as a court. But, in consideration of the meritorious and benevolent object of the law, they agreed to construe the power as conferred on them individually as commissioners, and to adjourn the court over from time to time, so as to enable them to perform the duty in the character of commissioners, and out of court.

"The judges of the Pennsylvania circuit, consisting of Wilson and Blair, Justices of the Supreme Court, and Peters, district judge, refused to execute it altogether, upon the ground that it was conferred on them as a court, and was not a judicial power when subject to the revision of the secretary of war and Congress.

"The judges of the Circuit Court of North Carolina, composed of Iredell, Justice of the Supreme Court, and Sitgreaves, district judge, were of opinion that the court could not execute it as a judicial power, and held it under advisement whether they might not construe the act as the appointment of the judges personally as commissioners, and perform the duty in the character of commissioners out of court, as had been agreed on by the judges of the New York circuit.

"These opinions, it appears by the report in 2 Dall., were all communicated to the President, and the motion for a mandamus in Heyburn's

the subject-matter in the tribunal appointed to perform the duty, and to be bound by its decision. In both cases the

case, at the next term of the Supreme Court, would seem to have been made merely for the purpose of having it judicially determined in this court whether the judges, under that law, were authorized to act in the character of commissioners. For every judge of the court, except Thomas Johnson, whose opinion is not given, had formally expressed his opinion in writing, that the duty imposed, when the decision was subject to the revision of a secretary and of Congress, could not be executed by the court as a judicial power; and the only question upon which there appears to have been any difference of opinion was, whether it might not be construed as conferring the power on the judges personally as commissioners. And if it would bear that construction, there seems to have been no doubt at that time but that they might constitutionally exercise it, and the secretary constitutionally revise their decisions. The law, however, was repealed at the next session of the legislature, and a different way provided for the relief of the pensioners: and the question, as to the construction of the law, was not decided in the Supreme Court. But the repeal of the act clearly shows that the President and Congress acquiesced in the correctness of the decision, that it was not a judicial power.

“ This law is the same in principle with the one we are now considering, with this difference only, that the act of 1792 imposed the duty on the court *eo nomine*, and not personally on the judges. In the case before us, it is imposed on the judge, and it appears from the note to the case of Heyburn, that a majority of the judges of the Supreme Court were of opinion that if the law of 1792 had conferred the power on the judges, they would have held that it was given to them personally by that description, and would have performed the duty as commissioners, subject to the revision and control of the secretary and Congress, as provided in the law. Nor have Justices Wilson, Blair, and Peters, district judges, dissented from this opinion. Their communication to the President is silent upon this point. But the opinions of all the judges embrace distinctly and positively the provisions of the law now before us, and declare that, under such a law, the power was not judicial within the grant of the Constitution, and could not be exercised as such. Independently of these objections, we are at some loss to understand how this case could legally be transmitted to this court, and certified as the transcript of a record in the district court. According to the directions of the Act of Congress, the decision of the judge and the evidence on which it is founded, ought to have been transmitted to the Secretary of the Treasury. They are not to remain in the district court, nor to be recorded there. They legally belong to the office of the

United States had an interest, since, if the claims were allowed, they must be paid from the treasury; and if not allowed, the government would not be called upon to pay: but the Acts of Congress, providing for the adjustment of the claims, did not make the United States a party to the proceedings, and the absence of a contesting party is one circumstance which marks the distinction between adjudications which belong to the judicial power, and those which do not.¹

§ 100. There is a recent statute which establishes a commission for the adjudication of private land claims, which makes provisions that obviously bring the proceedings within the judicial power. By the Treaty of Guadalupe Hidalgo, between the United States and Mexico, which ceded to the United States territory now lying within the limits of California, the property of Mexicans, resident or non-resident in the territory ceded, was secured to them; and by an Act of Congress, passed March 3, 1851, a commission was constituted for the purpose of ascertaining and settling the private land claims, growing out of titles derived from the Spanish or Mexican governments. The act directed the appointment of an agent to superintend the interests of the United States before the commissioners; that the commissioners should receive evidence on behalf of the claimant, and also on behalf of the United States, and should decide on the validity of the claim, and within thirty days after their decision, should certify the same, with the reasons on which it was founded, to the District Attorney of the United States. It further provided, that either party, the claimant, or the United

Secretary of the Treasury, and not to the court; and a copy from the clerk of the latter would not be evidence in any court of justice. There is no record of the proceedings in the district court, of which a transcript can legally be made and certified; and, consequently, there is no transcript now before us that we can recognise as evidence of any proceeding or judgment in that court."

¹ See the argument of Ch. Justice Marshall in *Jona. Robbins' case*, cited *ante*, § 87.

States by their District Attorney, might present a petition to the District Court to review the decision of the commissioners; prescribed the pleadings and evidence on which the court should proceed to such review, and from the judgment of the District Court gave an appeal to the Supreme Court of the United States. All lands to which claims were not finally established, were declared, by the act, to be part of the public domain of the United States.

§ 101. It is quite obvious that proceedings thus instituted in the District Court, to which the United States are a party, as a contesting claimant of the land in controversy, by virtue of their sovereignty; conducted upon allegations and evidence; and finally carried by appeal to the highest judicial tribunal;—are judicial proceedings: and the jurisdiction of the courts of the United States attaches, both upon the ground that the cases arise under a treaty, and an Act of Congress, and because the United States are a party.¹

§ 102. Similar proceedings were provided for by Acts of Congress, passed to carry into effect the treaties by which Florida and Louisiana were ceded to the United States. The whole series of adjudged cases under these acts, developing the principles of jurisprudence applied to the claims, will be examined in a subsequent chapter.²

¹ See further respecting the jurisdiction in the cases of California Land Titles, *post*.

² See *post*.

CHAPTER VII.

DISTRIBUTION AND EXERCISE OF THE JUDICIAL POWER.

§ 103. HAVING now taken a survey of the cases within the judicial power of the United States, we are next to examine the mode in which it is to be exercised, the tribunals in which it is or may be vested, and its relations to the state tribunals.

§ 104. The great mass of jurisdiction, of which the outline has been stated in the previous chapters, except so far as it was vested in some tribunal by the Constitution itself, remained to be distributed, vested, and regulated by Congress. The Constitution declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."¹ It then declares, after the enumeration of the cases to which the judicial power shall extend, that "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."² So far, therefore, as the judicial power was not vested by the Constitution itself, it became the duty of Congress to vest it, and to vest it in tribunals created by Congress itself. Consequently, no part of it could be conferred on state courts.³

¹ Art. 3, Sec. 1.

² Art. 3, Sec. 2.

³ *Martin v. Hunter*, 1 Wheaton, 304.

§ 105. The Constitution itself has established one tribunal, or rather made its establishment imperative upon Congress, and left to the discretion of Congress the form and jurisdiction of such inferior tribunals as it may from time to time deem necessary, as the depositories of that portion of the jurisdiction not already vested in the Supreme Court. The mandate is supposed, however, to be imperative, in both of its branches. Congress could not lawfully have refused to establish the Supreme Court, as the depository of the original and appellate jurisdiction which the Constitution had declared shall be vested in it; and it would seem that Congress are equally bound to create some inferior courts, in which to vest all the jurisdiction which is by the Constitution exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance: since the whole judicial power must at all times be vested, either in an original or appellate form, in some tribunals created by Congress.¹

§ 106. The Constitution having extended the judicial power to all the cases which it enumerates, and having limited the mode of its exercise in no other way than to declare that the Supreme Court shall have original jurisdiction in certain cases, and an appellate jurisdiction in all other cases, with such exceptions and under such regulations as Congress shall make, the whole mass of the jurisdiction is manifestly to be exercised either in the form of original or appellate jurisdiction, or both; since there is nothing in the nature of the cases, which binds to the exercise of the one in preference to the other.² The first inquiry, therefore, that presents itself, is, what is the constitutional mode in which the original jurisdiction may be exercised.

§ 107. Original jurisdiction is that in which something is demanded, in the first instance, by the institution of process: or, as it is commonly termed, by the commencement of a

¹ *Martin v. Hunter, ub. supr.*

² *Ibid.*

suit. The Constitution has vested a certain amount of original jurisdiction in the Supreme Court: namely, "In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party." As to all the residue of the original jurisdiction, the mode of its exercise is not expressly directed. Three questions, however, arise: First, whether the original jurisdiction of the Supreme Court, as established by the Constitution, is exclusive of all the other tribunals that may be created by Congress, so that no other tribunal can be authorized to take original cognizance of those cases. Secondly, whether this original jurisdiction of the Supreme Court excludes its appellate jurisdiction in the same class of cases, so that it cannot be authorized to exercise appellate jurisdiction in reference to any of those cases. Thirdly, whether the Supreme Court can be authorized to take original cognizance of any other cases than those which are enumerated as the subjects of its original jurisdiction.

§ 108. The first of these questions remains undecided by the Supreme Court. It arose in a case where an indictment was found in a circuit court, for an assault upon the person of a foreign minister; but the case was disposed of upon the ground that an indictment in the name of the United States for an assault upon a foreign minister, is not a case "affecting" the minister, and consequently is not within the 3d article of the Constitution, section second.¹ It had been previously held by the Circuit Court for the district of Pennsylvania, that jurisdiction in a criminal prosecution against a foreign consul could be constitutionally vested in that court.² But the Supreme Court have, on more than one occasion, intimated the opinion that their original jurisdiction is exclusive. This seems to be the result of the reasoning in *Marbury v. Madison*.³ More recently, it was said, that the

¹ *The United States v. Ortega*, 11 Wheat. 467.

² *United States v. Ravara*, 2 Dall. 297.

³ *Marbury v. Madison*, 1 Cranch, 137.

inferior courts might take original cognizance of cases which belong, on account of the nature of the controversy, to the judicial power of the United States, although a public minister or a state be a party, and that the Supreme Court may exercise appellate jurisdiction in such cases.¹ But it has not been expressly determined, that where the jurisdiction depends entirely on the character of the party, as a public minister, or a state, Congress can invest any other tribunal than the Supreme Court with original jurisdiction: but on the contrary, it has been intimated that the original jurisdiction of the inferior courts is excluded by the Constitution, in reference to those cases where original jurisdiction is conferred upon the Supreme Court.²

§ 109. The next question is, whether the original jurisdiction of the Supreme Court excludes its appellate jurisdiction, so that it cannot be authorized to exercise appellate jurisdiction in cases to which a public minister or a state is a party, originating in another court. This question has also been decided by the Supreme Court in favor of the exercise of its appellate jurisdiction, in cases which belong to the judicial power of the United States on account of the character of the cause, notwithstanding the character of one of the parties is such as would, if that were the sole ground of jurisdiction, bring the case within the original jurisdiction of that court. Thus, if a state is a party to a suit which originates elsewhere than in the Supreme Court of the United States, and if in that suit a question arises under the Constitution, laws, or treaties of the United States, the Supreme Court may exercise its appellate jurisdiction, on account of the character of the cause, and that jurisdiction will not be excluded on account of the character of the party.³ This great distinc-

¹ *Cohens v. Virginia*, 6 Wheat. 264, 392. See the extract from the opinion of the court, *post*, § 109.

² *Osborn v. The U. S. Bank*, 9 Wheat. 738, 820, 821. See also Story's *Comm. on the Const.*, § 1697-1699.

³ *Cohens v. Virginia*, 6 Wheat. 392, *et seq.*; *Martin v. Hunter*, 1 Wheat. 337.

tion was fully developed in the case of *Cohens v. Virginia*,¹ in which Mr. Chief Justice Marshall employed the following reasoning :—

“The words of the Constitution are ‘in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction.’

“This distinction between original and appellate jurisdiction excludes, we are told, in all cases, the exercise of the one where the other is given.

“The Constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form, are cases arising under the Constitution and laws of the United States. These provisions of the Constitution are equally obligatory, and are to be equally respected. If a state be a party, the jurisdiction of this court is original : if the case arise under a Constitution or a law, the jurisdiction is appellate. But a case to which a state is a party may arise under the Constitution, or a law of the United States. What rule is applicable to such a case ? What, then, becomes the duty of the court ? Certainly, we think, so to construe the Constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.

“In one description of cases, the jurisdiction of the court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the Constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character of the

¹ *Cohens v. Virginia*, 6 Wheaton, 392.

case, and the parties are not contemplated by the Constitution. In these the nature of the case is everything, the character of the parties nothing. When, then, the Constitution declares the jurisdiction, in cases where a state shall be a party, to be original, and in all cases arising under the Constitution, or a law, to be appellate, the conclusion seems irresistible, that its framers designed to include in the first class those cases in which jurisdiction is given, because a state is a party; and to include in the second those in which jurisdiction is given, because the case arises under the Constitution, or a law.

“This reasonable construction is rendered necessary by other considerations.

“That the Constitution, or a law of the United States, is involved in a case, and makes a part of it, may appear in the progress of a cause, in which the courts of the Union, but for that circumstance, would have no jurisdiction, and which, of consequence, could not originate in the Supreme Court. In such a case, the jurisdiction can be exercised only in its appellate form. To deny its exercise in this form is to deny its existence, and would be to construe a clause, defining the power of the Supreme Court, in such a manner, as in a considerable degree to defeat the power itself. All must perceive that this construction can be justified only where it is absolutely necessary. We do not think the article under consideration presents that necessity.

“It is observable, that in this distributive clause, no negative words are introduced. This observation is not made for the purpose of contending that the legislature may ‘apportion the judicial power between the Supreme and inferior courts, according to its will.’ That would be, as was said by the court in the case of *Marbury v. Madison*, to render the distributive clause ‘mere surplusage,’ to make it ‘form without substance.’ This cannot, therefore, be the true construction of the article.

“But although the absence of negative words will not authorize the Legislature to disregard the distribution of the

power previously granted, their absence would justify a sound construction of the whole article so as to give every part its intended effect. It is admitted, that 'affirmative words are often, in their operation, negative of other objects than those affirmed;' and that where 'a negative or exclusive sense must be given to them, or they have no operation at all,' they must receive that negative or exclusive sense. But where they have full operation without it; where it would destroy some of the most important objects for which the power was created, then, we think, affirmative words ought not to be construed negatively.

"The Constitution declares, that in cases where a state is a party, the Supreme Court shall have original jurisdiction, but does not say that its appellate jurisdiction shall not be exercised in cases where, from their nature, appellate jurisdiction is given, whether a state be or be not a party. It may be conceded, that where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there: but where, from its nature, it cannot originate in that court, these words ought not to be so construed as to require it. There are many cases in which it would be found extremely difficult, and subversive of the spirit of the Constitution, to maintain the construction, that appellate jurisdiction cannot be exercised where one of the parties might sue or be sued in this court.

"The Constitution defines the jurisdiction of the Supreme Court, but does not define that of the inferior courts. Can it be affirmed, that a state might not sue the citizen of another state in a circuit court? Should the circuit court decide for or against its jurisdiction, should it dismiss the suit, or give judgment against the state, might not its decision be revised in the Supreme Court? The argument is, that it could not: and the very clause which is urged to prove that the circuit court could give no judgment in the case, is also urged to prove that its judgment is irreversible. A supervising court, whose peculiar province it is to correct the errors of an inferior court, has no power to correct a

judgment given without jurisdiction, because, in the same case, that supervising court has original jurisdiction. Had negative words been employed, it would be difficult to give them this construction if they would admit of any other. But, without negative words, this irrational construction can never be maintained.

“So, too, in the same clause, the jurisdiction of the court is declared to be original ‘in cases affecting ambassadors, other public ministers, and consuls.’ There is, perhaps, no part of the article under consideration so much required by national policy as this; unless it be that part which extends the judicial power ‘to all cases arising under the Constitution, laws, and treaties of the United States.’ It has been generally held, that the state courts have a concurrent jurisdiction with the federal courts, in cases to which the judicial power is extended, unless the jurisdiction of the federal courts be rendered exclusive by the words of the third article. If the words ‘to all cases,’ give exclusive jurisdiction in cases affecting foreign ministers, they may also give exclusive jurisdiction, if such be the will of Congress, in cases arising under the Constitution, laws, and treaties of the United States. Now suppose an individual were to sue a foreign minister in a state court, and that court were to maintain its jurisdiction, and render judgment against the minister, could it be contended, that this court would be incapable of revising such judgment, because the Constitution had given it original jurisdiction in the case? If this could be maintained, then a clause inserted for the purpose of excluding the jurisdiction of all other courts than this, in a particular case, would have the effect of excluding the jurisdiction of this court in that very case, if the suit were to be brought in another court, and that court were to assert jurisdiction. This tribunal, according to the argument which has been urged, could neither revise the judgment of such other court, nor suspend its proceedings; for a writ of prohibition, or any other similar writ, is in the nature of appellate process.

“Foreign consuls frequently assert, in our prize courts, the claims of their fellow-subjects. These suits are maintained by them as consuls. The appellate power of this court has been frequently exercised in such cases, and has never been questioned. It would be extremely mischievous to withhold its exercise. Yet the consul is a party on the record. The truth is, that where the words confer only appellate jurisdiction, original jurisdiction is most clearly not given ; but where the words admit of appellate jurisdiction, the power to take cognizance of the suit originally, does not necessarily negative the power to decide upon it on an appeal, if it may originate in a different court.

“It is, we think, apparent, that to give this distributive clause the interpretation contended for, to give its affirmative words a negative operation, in every possible case, would, in some instances, defeat the obvious intention of the article. Such an interpretation would not consist with those rules which, from time immemorial, have guided courts, in their construction of instruments brought under their consideration. It must, therefore, be discarded. Every part of the article must be taken into view, and that construction adopted which will consist with its words, and promote its general intention. The court may imply a negative from affirmative words, where the implication promotes, not where it defeats the intention.

“If we apply this principle, the correctness of which we believe will not be controverted, to the distributive clause under consideration, the result, we think, would be this: The original jurisdiction of the Supreme Court, in cases where a state is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal courts ; not to those cases in which an original suit might not be instituted in a federal court. Of the last description is every case between a state and its citizens, and, perhaps, every case in which a state is enforced

ing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction. In every other case, that is, in every case to which the judicial power extends, and in which original jurisdiction is not expressly given, that judicial power shall be exercised in the appellate, and only in the appellate form. The original jurisdiction of this court cannot be enlarged, but its appellate jurisdiction may be exercised in every case cognizable under the third article of the Constitution, in the federal courts, in which original jurisdiction cannot be exercised; and the extent of this judicial power is to be measured, not by giving the affirmative words of the distributive clause a negative operation in every possible case, but by giving their true meaning to the words which define its extent.

“The words of the Constitution are: ‘In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction.’

“The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court, in the case of *Marbury v. Madison*.

“It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connexion with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered, in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

“In the case of *Marbury v. Madison*, the single question before the court, so far as that case can be applied to this, was, whether the legislature could give this court original

jurisdiction in a case in which the Constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But, in the reasoning of the court in support of this decision, some expressions are used which go far beyond it. The counsel for Marbury had insisted on the unlimited discretion of the legislature in the appointment of the judicial power; and it is against this argument that the reasoning of the court is directed. They say that, if such had been the intention of the article, 'it would certainly have been useless to proceed farther than to define the judicial power, and the tribunals in which it should be vested.' The court says, that such a construction would render the clause, dividing the jurisdiction of the court into original and appellate, totally useless: that 'affirmative words are often, in their operation, negative of other objects than those which are affirmed; and, in this case (in the case of *Marbury v. Madison*), a negative or exclusive sense must be given to them, or they have no operation at all.' 'It cannot be presumed,' adds the court, 'that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.'

"The whole reasoning of the court proceeds upon the idea that the affirmative words of the clause giving one sort of jurisdiction, must imply a negative of any other sort of jurisdiction, because otherwise the words would be totally inoperative, and this reasoning is advanced in a case to which it was strictly applicable. If in that case original jurisdiction could have been exercised, the clause under consideration would have been entirely useless. Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle. The reasoning sustains the negative operation of

the words in that case, because otherwise the clause would have no meaning whatever, and because such operation was necessary to give effect to the intention of the article. The effort now made is, to apply the conclusion to which the court was conducted by that reasoning in the particular case, to one in which the words have their full operation when understood affirmatively, and in which the negative, or exclusive sense, is to be so used as to defeat some of the great objects of the article.

“To this construction the court cannot give assent. The general expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion: limitations which in no degree affect the decision in that case, or the tenor of its reasoning.

“The counsel who closed the argument, put several cases for the purpose of illustration, which he supposed to arise under the Constitution, and yet to be, apparently, without the jurisdiction of the court.

“Were a state to lay a duty on exports, to collect the money, and place it in her treasury, could the citizen who paid it, he asks, maintain a suit in this court against such state, to recover back the money?

“Perhaps not. Without, however, deciding such supposed case, we may say, that it is entirely unlike that under consideration.

“The citizen who has paid his money to his state, under a law that is void, is in the same situation with every other person who has paid money by mistake. The law raises an assumpsit to return the money, and it is upon that assumpsit that the action is to be maintained. To refuse to comply with this assumpsit may be no more a violation of the Constitution than to refuse to comply with any other; and as the federal courts never had jurisdiction over contracts between a state and its citizens, they may have none over this. But let us so vary the supposed case as to give it a real resemblance to that under consideration. Suppose a citizen to refuse to pay this export duty, and a suit to be instituted for

the purpose of compelling him to pay it. He pleads the Constitution of the United States in bar of the action, notwithstanding which the court gives judgment against him. This would be a case arising under the Constitution, and would be the very case now before the court.

“We are also asked, if a state should confiscate property secured by a treaty, whether the individual could maintain an action for that property?”

“If the property confiscated be debts, our own experience informs us that the remedy of the creditor against his debtor remains. If it be land, which is secured by a treaty, and afterwards confiscated by a state, the argument does not assume that this title, thus secured, could be extinguished by an act of confiscation. The injured party, therefore, has his remedy against the occupant of the land for that which the treaty secures to him, not against the state for money which is not secured to him.

“The case of a state which pays off its own debts with paper money, no more resembles this than do those to which we have already adverted. The federal courts have no jurisdiction over the contract. They cannot enforce it, nor judge of its violation. Let it be that the act discharging the debt is a mere nullity, and that it is still due. Yet the federal courts have no cognizance of the case. But, suppose a state to institute proceedings against an individual, which depended on the validity of an act emitting bills of credit: suppose a state to prosecute one of its citizens for refusing paper money, who should plead the Constitution in bar of such prosecution. If his plea should be overruled, and judgment rendered against him, his case would resemble this; and unless the jurisdiction of this court might be exercised over it, the Constitution would be violated, and the injured party be unable to bring his case before that tribunal to which the people of the United States have assigned all such cases.

“It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legis-

lature may, avoid a measure, because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in *all* cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

“To escape the operation of these comprehensive words, the counsel for the defendant has mentioned instances in which the Constitution might be violated without giving jurisdiction to this court. These words, therefore, however universal in their expression, must, he contends, be limited and controlled in their construction by circumstances. One of these instances is, the grant by a state of a patent of nobility. The court, he says, cannot annul this grant.

“This may be very true; but by no means justifies the inference drawn from it. The article does not extend the judicial power to every violation of the Constitution which may possibly take place, but to ‘a case in law or equity,’ in which a right under such law is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of

the Constitution, of which the courts can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import ought to be given to this article. They do not show that there can be ‘*a case in law or equity,*’ arising under the Constitution, to which the judicial power does not extend.”

§ 110. The third question is, whether the Supreme Court can be authorized to take original cognizance of any other cases than those enumerated in the Constitution. This question arose in the case of *Marbury v. Madison*,¹ which was an application to the Supreme Court for a *mandamus*, to command the Secretary of State to deliver a commission to a person who had been appointed by the President a justice of the peace. The court held that this was an application for the exercise of original jurisdiction; that their original jurisdiction can include only the cases enumerated in the Constitution; and that as this was not one of those causes, the clause in the judiciary act which authorized the Supreme Court to issue writs of *mandamus* to public officers, is unconstitutional. Mr. Chief Justice Marshall, delivering the opinion of the court, said:—

“It has been insisted, at the bar, that as the original grant of jurisdiction, to the Supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the Supreme Court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article, which has been recited; provided those cases belong to the judicial power of the United States.

“If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the Supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part

¹ 1 Cranch, 137; 3d edit., p. 49, 67, 68.

of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If Congress remains at liberty to give this court appellate jurisdiction, where the Constitution has declared their jurisdiction shall be original; and original jurisdiction where the Constitution has declared it shall be appellate: the distribution of jurisdiction made in the Constitution is form without substance.

“Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.

“It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.

“If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the Supreme Court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of Congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as Congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

“When an instrument organizing fundamentally a judicial system, divides it into one Supreme, and so many inferior courts as the legislature may ordain and establish, then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the Supreme Court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

“To enable this court, then, to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

“It has been stated at the bar, that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a *mandamus* should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

“It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet, to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.”

§ 111. As to all the residue, therefore, of the original jurisdiction, comprehended within the judicial power, which is not vested in the Supreme Court by the Constitution, it obviously remains to be vested by Congress in any inferior tribunals which it may see fit to create.¹

§ 112. The next inquiry is as to the constitutional form in which the appellate jurisdiction is to be exercised. The Constitution has itself vested a certain portion of the appellate jurisdiction in the Supreme Court, namely, in all the other cases, cognizable by the judicial power of the United States, except those where original jurisdiction is vested in the Supreme Court. The appellate jurisdiction of the Supreme Court is, therefore, the first branch of the appellate portion of the judicial power ; and the first question

¹ *Martin v. Hunter*, 1 Wheat. 304, 337 ; *Osborn v. The U. S. Bank*, 9 Wheat. 738, 820 ; *Cohens v. Virginia*, 6 Wheat. 395 ; *Story's Comm. on the Const.*, § 1698.

that arises concerning it is, whether it requires any legislation to vest or regulate it. The Constitution vests in the Supreme Court a full appellate jurisdiction, which would have extended to all cases that belong to the judicial power, but for the clause which declares that its appellate power, "both as to law and fact," shall be exercised with "such exceptions, and under such regulations, as the Congress shall make:" and if no legislation undertakes to regulate it, the appellate jurisdiction remains complete over all the cases belonging to the judicial power. But as it is made subject to the regulation of Congress, its limits are to be looked for in the legislation by which it has been regulated:¹ and this

¹ *Durousseau v. The United States*, 6 Cranch, 307, 313. In this case, Mr. C. J. Marshall said, "It is contended that the words of the Constitution vest an appellate jurisdiction in this court, which extends to every case not excepted by Congress; and that if the court had been created without any express definition or limitation of its powers, a full and complete appellate jurisdiction would have vested in it, which must have been exercised in all cases whatever.

"The force of this argument is perceived and admitted. Had the judicial act created the Supreme Court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the Constitution assigns to it. The legislature would have exercised the power it possessed of creating a Supreme Court as ordained by the Constitution; and, in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished. The appellate powers of this court are not given by the judicial act. They are given by the Constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.

"When the first legislature of the Union proceeded to carry the third article of the Constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

"The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in

will be a proper subject of investigation under the appropriate head of the appellate jurisdiction of the Supreme Court.¹

§ 113. The next question is, how the appellate jurisdiction of the Supreme Court is to be exercised. It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.² In order, therefore, that the appellate jurisdiction should be exercised, there must be some proceeding in an inferior judicial tribunal, which is to be revised. The Constitution does not prescribe the form in which it is to be done, and the form may be prescribed by Congress, either by a writ of *habeas corpus* or *mandamus*, or a writ of error, or an appeal, or in any other mode in which the judgment or proceedings of an inferior tribunal can be revised.³

§ 114. The next question is as to the subject-matter on which

the legislature to effect a certain object, some degree of implication may be called in to aid that intent.

"It is upon this principle that the court implies a legislative exception from its constitutional appellate power in the legislative affirmative description of those powers.

"Thus, a writ of error lies to the judgment of a circuit court, where the matter in controversy exceeds the value of two thousand dollars. There is no express declaration that it will not lie where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in the circuits, where the matter in controversy is of less value, and implies negative words.

"This restriction, however, being implied by the court, and that implication being founded on the manifest intent of the legislature, can be made only where that manifest intent appears. It ought not to be made for the purpose of defeating the intent of the legislature." See also *United States v. Moore*, 3 Cranch, 159, 170.

¹ *Post*.

² Per Marshall, C. J., in *Marbury v. Madison*, 1 Cranch. 137.

³ *Marbury v. Madison*, 1 Cranch, 137; *Weston v. City Council of Charleston*, 2 Peters, 449; *United States v. Hamilton*, 3 Dall. 17; *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Kearney*, 7 Wheaton, 38; *Ex parte Crane*, 5 Peters, 190; *Story's Comm. on the Const.*, § 1755, 1756.

the appellate jurisdiction of the Supreme Court is to act,—whether it may constitutionally embrace the law and the fact of the case, or the law only. As the Constitution was originally adopted, the Supreme Court was vested with appellate jurisdiction, “both as to law and fact.” But by the 7th of the amendments it was declared that, “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.”¹ It has been held that this latter clause is to be read as a substantive and independent clause, and that it is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner than in the modes known to the common law. The only modes known to the common law to re-examine such facts are, the granting of a new trial by the court where the issue was tried, or to which the record is properly returnable; or the award of a *venire facias de novo* by the appellate court, for some error of law which intervened in the proceedings. Consequently, Congress cannot constitutionally confer upon the Supreme Court authority to grant a new trial by a re-examination of the facts once tried by a jury, except to redress errors of law.²

§ 115. The next question is as to the courts to which the appellate power of the Supreme Court constitutionally extends: whether it includes the state courts, or is confined to the courts of the United States. This question first arose in the case of *Martin v. Hunter*, and it was there held, upon great consideration, that if the case is within the judicial power, that is, if the character of a party or the character of the cause be such as the Constitution describes, the appel-

¹ See the history and reasons for this amendment in *Parsons v. Bedford*, 3 Peters, 433, 446.

² *Parsons v. Bedford*, 3 Peters, 447–449: see also *Bank of Hamilton v. Dudley's Lessee*, 2 Peters, 492.

late power of the Supreme Court will reach it, in whatever tribunal it is depending.¹ Mr. Justice Story, delivering the opinion of the court in this case, said:—

“As, then, by the terms of the Constitution, the appellate jurisdiction is not limited as to the Supreme Court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, ‘The judicial power (which includes appellate power) shall extend *to all cases*,’ &c., and ‘in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction.’ It is the *case*, then, and not *the court*, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification, to show its existence by necessary implication. If the text be clear and distinct, no restriction upon the plain and obvious import ought to be admitted, unless the inference be irresistible.

“If the Constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the Constitution, be exclusive of state tribunals. How otherwise could the jurisdiction extend to *all cases* arising under the Constitution, laws, and treaties of the United States, or to *all cases* of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to *all*, but to *some* cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the Constitution without control, then the appellate jurisdiction of the United States might, as to such

¹ Martin v. Hunter, 1 Wheaton, 304.

cases, have no real existence, contrary to the manifest intent of the Constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive ; and this not only when the *casus fœderis* should arise directly, but when it should arise, incidentally, in cases pending in state courts. This construction would abridge the jurisdiction of such court far more than has ever been contemplated in any Act of Congress.

“ On the other hand, if, as has been contended, a discretion be vested in Congress, to establish, or not to establish, inferior courts at their own pleasure, and Congress should not establish such courts, the appellate jurisdiction of the Supreme Court would have nothing to act upon, unless it could act upon cases pending in the state courts. Under such circumstances it must be held that the appellate power would extend to state courts, for the Constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power vested in Congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the Constitution in relation to the whole appellate power.

“ But it is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance not only might, but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view, the sixth article declares, that ‘ this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.’ It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to pro-

nounce the law applicable to the case in judgment. They were not to decide merely according to the laws or Constitution of the state, but according to the Constitution, laws, and treaties of the United States, 'the supreme law of the land.'

"A moment's consideration will show us the necessity and propriety of this provision in cases where the jurisdiction of the state courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same state, and performance thereof is sought in the courts of that state; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose at the trial the defendant sets up in his defence a tender under a state law, making paper money a good tender, or a state law, impairing the obligation of such contract, which law, if binding, would defeat the suit. The Constitution of the United States has declared that no state shall make anything but gold or silver coin a tender in payment of debts, or pass a law impairing the obligation of contracts. If Congress shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the state courts proceed to hear and determine it? Can a mere plea in defence be of itself a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a state court, and the defendant should allege in his defence that the crime was created by an *ex post facto* act of the state, must not the state court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mis-

chiefs, of a most enormous magnitude, would inevitably ensue. It must, therefore, be conceded that the Constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the Constitution, is to extend. It cannot extend by original jurisdiction, if that was already rightfully and exclusively attached in the state courts, which (as has been already shown) may occur; it must therefore extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the Constitution. It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments and the spirit of the Constitution. That the latter was never designed to act upon state sovereignties, but only upon the people, and that if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles we cannot admit, and draws conclusions to which we do not yield our assent. It is a mistake that the Constitution was not designed to operate upon states in their corporate capacities. It is crowded with provisions, which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. Surely when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the Constitution does not act upon the states. The language of the Constitution is also imperative upon the

states, as to the performance of many duties. It is imperative upon the state legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of president and vice-president. And in these, as well as some other cases, Congress have a right to revise, amend, or supersede the laws which may be passed by state legislatures. When, therefore, the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the states are, in some respects, under the control of Congress, and in every case are, under the Constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power. Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the Constitution; and if they should unintentionally transcend their authority, or misconstrue the Constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of state sovereignty.

“The argument urged from the possibility of the abuse of the revising power is equally unsatisfactory. It is always a doubtful course, to argue against the use or existence of a power from the possibility of its abuse. It is still more difficult, by such an argument, to engraft upon a general power

a restriction which is not to be found in the terms in which it is given. From the very nature of things, the absolute right of decision in the last resort, must rest somewhere,—wherever it may be vested it is susceptible of abuse. In all questions of jurisdiction the inferior, or appellate court, must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter.

“It has been further argued against the existence of this appellate power, that it would form a novelty in our judicial institutions. This is certainly a mistake. In the Articles of Confederation, an instrument framed with infinitely more deference to state rights and state jealousies, a power was given to Congress to establish “courts for revising and determining, finally, *appeals* in all cases of captures.” It is remarkable, that no power was given to entertain *original* jurisdiction in such cases; and, consequently, the appellate power (although not so expressed in terms), was altogether to be exercised in revising the decisions of state tribunals. This was, undoubtedly, so far, a surrender of state sovereignty; but it never was supposed to be a power fraught with public danger, or destructive to the independence of state judges. On the contrary, it was supposed to be a power indispensable to the public safety, inasmuch as our national rights might otherwise be compromised, and our national peace be endangered. Under the present Constitution, the prize jurisdiction is confined to courts of the United States, and a power to revise the decisions of state courts, if they should assert jurisdiction over prize causes, cannot be less important, or less useful, than it was under the Confederation. In this connexion we are led again to the construction of the words of the Constitution, “the judicial power shall extend,” &c. If, as has been contended at the bar, the term “extend” have a relative signification, and means to widen an existing power, it will then follow, that, as the Confederation gave an appellate power over state tribunals, the Constitution enlarged or widened that appellate power to all the other cases in which jurisdiction is given to

courts of the United States. It is not presumed that the learned counsel would choose to adopt such a conclusion.

“It is further argued, that no great public mischief can result from a construction which shall limit the appellate powers of the United States to cases in their own courts: first, because state judges are bound by an oath to support the Constitution of the United States, and must be presumed to be men of learning and integrity; and, secondly, because Congress must have an unquestionable right to remove all cases within the scope of the judicial power from the state courts to the courts of the United States, at any time before final judgment, though not after final judgment. As to the first reason, admitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom as those of the courts of the United States (which we very cheerfully admit), it does not aid the argument. It is manifest that as the Constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted, we can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The Constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct, or control, or be supposed to obstruct, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of Congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts. In respect to the other enumerated cases, the cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors and other

public ministers, and cases of admiralty and maritime jurisdiction, reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction. This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity, of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself. If there was no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy in any two states. The public mischief that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened Convention which formed the Constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

“There is an additional consideration, which is entitled to great weight. The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purpose. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights or assert their privileges before the same forum. Yet, if the construction contended for be correct, it will follow that as the plaintiff may always elect the state court, the defendant may be deprived of all the security which the

Constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights. To obviate this difficulty, we are referred to the power which it is admitted Congress possesses to remove suits from state courts to the national courts, and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

“This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as Congress is not limited by the Constitution to any particular mode or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied by the legislature to interlocutory as well as final judgments. And if the right of removal from state courts exists before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power by the Constitution does not include cases pending in state courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely

the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together. Nor, indeed, would the force of the arguments on either side materially vary if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of state tribunals. The remedy, too, of removal of suits would be utterly inadequate to the purposes of the Constitution if it could act only on the parties, and not upon the state courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable; and in respect to civil suits, there would in many cases be rights without corresponding remedies. If state courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases, there would be at once an end of all control, and the state decisions would be paramount to the Constitution, and though in civil suits the courts of the United States might act upon the parties, yet the state courts might act in the same way; and this conflict of jurisdictions would not only jeopardize private rights, but bring into imminent peril the public interests. On the whole, the court are of opinion that the appellate power of the United States does extend to cases pending in the state courts, and that the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the Constitution. We find no clause in that instrument which limits this power, and we dare not interpose a limitation where the people have not been disposed to create one."

§ 116. The same question again arose in the case of *Cohens v. Virginia*,¹ and the court again affirmed the same doctrine, which practice has now rendered long familiar. In this case, Mr. Ch. Justice Marshall, delivering the opinion

¹ 6 Wheaton, 413.

of the court, said: "The second objection to the jurisdiction of the court is, that its appellate power cannot be exercised, in any case, over the judgment of a state court.

"This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a state from that of the Union, and their entire independence of each other. The argument considers the federal judiciary as completely foreign to that of a state, and as being no more connected with it in any respect whatever, than the courts of a foreign state. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the Constitution, the argument fails with it.

"This hypothesis is not founded on any words in the Constitution which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it; and on the incompatibility of the application of the appellate jurisdiction to the judgments of state courts with that constitutional relation which subsists between the government of the Union and the governments of those states which compose it.

"Let this unreasonableness, this total incompatibility, be examined.

"That the United States form, for many and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many persons, a nation; and for all these purposes, her government is complete; to all these objects it is competent. The people have declared, that in the exercise of all powers given for these

objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The Constitution and laws of a state, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These states are consistent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.

“In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the Constitution or law of a state, if it be repugnant to the Constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a state tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the Constitution?

“We think it is not. We think that in a government acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the state tribunals which may contravene the Constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

“The propriety of intrusting the construction of the Constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn into question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them by the state tribunals. If the federal and state courts have concurrent jurisdiction in all

cases arising under the Constitution, laws, and treaties of the United States ; and if a case of this description, brought in a state court, cannot be removed before judgment, nor revised after judgment, then the construction of the Constitution, laws, and treaties of the United States is not confided particularly to their judicial department, but is confided equally to that department and the state courts, however they may be constituted. ‘Thirteen independent courts,’ says a very celebrated statesman (and we have now more than twenty such courts), ‘of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.’

“Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a state or its courts, the necessity of uniformity, as well as correctness in expounding the Constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved.

“We are not restrained, then, by the political relations between the general and state governments, from construing the words of the Constitution, defining the judicial power in their true sense. We are not bound to construe them more restrictively than they naturally import.

“They give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided. In expounding them, we may be permitted to take into view those considerations to which courts have always allowed great weight in the exposition of laws.

“The framers of the Constitution would naturally examine the state of things existing at the time : and their work sufficiently attests that they did so. All acknowledge

that they were convened for the purpose of strengthening the Confederation by enlarging the powers of the government, by giving efficacy to those which it before possessed, but could not exercise. They inform us themselves, in the instrument they presented to the American public, that one of its objects was to form a more perfect union. Under such circumstances, we certainly should not expect to find, in that instrument, a diminution of the actual powers of the government.

“Previous to the adoption of the Confederation, Congress established courts which received appeals in prize causes decided in the courts of the respective states. The power of the government to establish tribunals for these appeals, was thought consistent with, and was founded on, its political relation with the states. These courts did exercise appellate jurisdiction over those cases decided in the state courts to which the judicial power of the federal government extended.

“The Confederation gave to Congress the power ‘of establishing courts for receiving and finally determining appeals in all cases of captures.’

“This power was uniformly construed to authorize those courts to receive appeals from the sentences of state courts, and to affirm or reverse them. State tribunals are not mentioned: but this clause in the Confederation necessarily comprises them. Yet the relation between the general and state governments was much weaker, much more lax, under the Confederation than under the present Constitution, and the states being much more completely sovereign, their institutions were much more independent.

“The Convention which framed the Constitution, on turning their attention to the judicial power, found it limited to a few objects, but exercised, with respect to some of those objects, in its appellate form, over the judgments of the state courts. They extend it, among other objects, to all cases arising under the Constitution, laws, and treaties of the United States; and in a subsequent clause declared, that in

such cases, the Supreme Court shall exercise appellate jurisdiction.

“Nothing seems to be given which would justify the withdrawal of a judgment rendered in a state court, on the Constitution, laws, or treaties of the United States, from this appellate jurisdiction.

“Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is believed, has arisen to which this principle applies more unequivocally than to that now under consideration.

“The opinion of ‘The Federalist’ has always been considered as of great authority. It is a complete commentary on our Constitution; and is applied to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the Constitution, put it very much in their power to explain the views with which it was framed. The essays having been published while the Constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to more consideration where they frankly avow that the power objected to is given, and defend it.

“In discussing the extent of the judicial power, ‘The Federalist’ says: ‘Here another question occurs: what relation would subsist between the national and state courts in these instances of concurrent jurisdiction?’ I answer, that an appeal would certainly lie from the latter to the Supreme Court of the United States.

“The Constitution in direct terms, gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it

ought to be construed to extend to the state tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judicial authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved: the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and state systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of natural justice, and the rules of natural decision. The evident aim of the plan of the National Convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expressions which give appellate jurisdiction to the Supreme Court, to appeals from the subordinate federal courts, instead of allowing their extension to the state courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation.

“A contemporaneous exposition of the Constitution, certainly of not less authority than that which has been just cited, is the judiciary act itself. We know that in the Congress which passed that act were many eminent members of the Convention which formed the Constitution. Not a single individual, so far as is known, supposed that part of the act which gives the Supreme Court appellate jurisdiction over the judgments of the state courts in the cases therein specified, to be unauthorized by the Constitution.

“While on this part of the argument, it may be also ma-

terial to observe that the uniform decisions of this court on the point now under consideration, have been assented to, with a single exception, by the courts of every state in the Union whose judgments have been revised. It has been the unwelcome duty of this tribunal to reverse the judgments of many state courts, in cases in which the strongest state feelings were engaged. Judges, whose talents and character would grace any bench, to whom a disposition to submit to jurisdiction that is usurped, or to surrender their legitimate power, will certainly not be imputed, have yielded without hesitation to the authority by which their judgments were reversed, while they, perhaps, disapproved the judgment of reversal.

“This concurrence of statesmen, of legislators, and of judges, in the same construction of the Constitution, may justly inspire some confidence in that construction.

“In opposition to it, the counsel who made this point has presented in a great variety of forms, the idea already noticed, that the federal and state courts must, of necessity, and from the nature of the Constitution, be in all things totally distinct and independent of each other. If this court can correct the errors of the courts of Virginia, he says it makes them courts of the United States, or becomes itself a part of the judiciary of Virginia.

“But, it has been already shown that neither of these consequences necessarily follow. The American people may certainly give to a national tribunal a supervising power over those judgments of the state courts, which may conflict with the Constitution, laws, or treaties of the United States, without converting them into federal courts, or converting the national into a state tribunal. The one court still derives its authority from the state, the other still derives its authority from the nation.

“If it shall be established, he says, that this court has appellate jurisdiction over the state courts in all cases enumerated in the 3d article of the Constitution, a complete

consolidation of the states, so far as respects judicial power, is produced.

“But, certainly, the mind of the gentleman, who urged this argument, is too accurate not to perceive that he has carried it too far; that the premises by no means justify the conclusion. ‘A complete consolidation of the states, so far as respects the judicial power,’ would authorize the legislature to confer on the federal courts appellate jurisdiction from the state courts in all cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few specified cases, in the decision of which the nation takes an interest, is too obvious not to be perceived by all.

“This opinion has been already drawn out to too great a length to admit of entering into a particular consideration of the various forms in which the counsel who made this point has, with much ingenuity, presented his argument to the court. The argument in all its forms is essentially the same. It is founded, not on the words of the Constitution, but on its spirit; a spirit extracted, not from the words of the instrument, but from his view of the nature of our Union, and of the great fundamental principles on which the fabric stands.

“To this argument, in all its forms, the same answer may be given. Let the nature and objects of our Union be considered; let the great fundamental principles on which the fabric stands be examined, and we think the result must be, that there is nothing so extravagantly absurd in giving to the courts of the nation the power of revising the decisions of local tribunals, on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction. The question then must depend on the words themselves; and on their construction we shall be the more readily excused for not adding to the observations already made, because the subject was fully discussed and exhausted in the case of *Martin v. Hunter*.”

§ 117. The appellate jurisdiction thus conferred upon the Supreme Court does not exhaust the appellate portion of the judicial power, which may also be vested in a succession of inferior tribunals, and be exercised in any mode which Congress may see fit to prescribe, provided it does not impair or encroach upon the appellate power of the Supreme Court.¹

§ 118. In whatever tribunals the judicial power, or any portion of it, is vested, they possess, under the Constitution, besides the jurisdiction conferred upon them by the Constitution, or by statute, certain incidental powers, which may be aided and confirmed by legislation, but which do not require legislation for their exercise. These are the usual powers incident to courts of justice, such as power over their own officers, and power to protect themselves and their officers in the discharge of their functions.²

§ 119. In what sense, and to what extent, the Constitution

¹ *Martin v. Hunter*, 1 Wheat. 304, 337, 338; *Osborn v. The U. S. Bank*, 9 Wheat. 820, 821; *Cohens v. Virginia*, 6 Wheat. 392; Story's Comm. on the Const., § 1701.

² *Anderson v. Dunn*, 6 Wheaton, 204, 227; *Ex parte Bollman*, 4 Cranch, 75, 94. In *Anderson v. Dunn*, Mr. Justice Johnson, delivering the opinion of the court, said: "That the safety of the people is the supreme law," not only comports with, but is indispensable to, the exercise of those powers in their public functionaries, without which that safety cannot be guarded. On this principle it is, that courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition to preserve themselves and their officers from the approach and insults of pollution.

"It is true, that the courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts, but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment."

has made the judicial power of the United States exclusive of the jurisdiction of the state courts, is the next subject of inquiry. The language of the Constitution which defines and vests the judicial power, or which directs how it shall be vested, does not expressly declare that any portion of it shall be exclusive of the state courts. No express prohibition to the state courts is contained in that instrument, which is to prevent them from taking cognizance of the cases which are enumerated as the subjects of the national jurisdiction. If any such prohibition is to be considered as authorized by the Constitution, it must result by implication from the objects and purposes with which the judicial power was established, or must be gathered from the terms employed to describe and vest the jurisdiction of the courts of the United States. It will not be attempted here to define the exact boundaries of a jurisdiction which has not as yet been strictly defined by the highest national tribunal ; but it seems proper to suggest those considerations, bearing upon the subject, which may aid the adjudication of future questions, when they arise, and to state, how far these considerations have already received judicial sanction.

§ 120. In the first place, then, it is to be observed, that prior to the establishment of the Constitution of the United States, the courts of the several states had jurisdiction of many of the cases to which that Constitution extends the judicial power of the United States. Thus, controversies to which a state, or citizens of different states, or aliens, were parties, or controversies between citizens of the same state claiming lands under grants of different states, all existed, or might have existed before the adoption of the Constitution, and were, at the time of its adoption, cognizable in the state courts. On the other hand, there are cases within the judicial power, which did not exist, and could not have existed, before the adoption of the Constitution ; cases, which were called into existence by the Constitution, and over which the state courts could therefore have had no antecedent jurisdiction.

Such are many of the cases arising under the Constitution, laws, and treaties of the United States, and the controversies to which the United States may be a party. There is still a third class of cases, where the state courts may have had a possible antecedent jurisdiction, but which are to be considered as so intimately connected with the exercise of the national sovereignty, as to give rise to some presumption that when the Constitution included them within the judicial power, it was intended to give an exclusive cognizance of them to the national tribunals. These are the cases affecting ambassadors, and cases of admiralty and maritime jurisdiction. These considerations show clearly, that in determining the boundaries of the federal jurisdiction, it is necessary, on the one hand, to have regard to the fact of a pre-existing jurisdiction in the state courts, or to the absence of such jurisdiction, and on the other hand, to have regard to the great objects and purposes with which each case was included within the judicial power.

§ 121. As to all that class of cases which existed before the Constitution, and of which the state courts clearly had jurisdiction, it is obvious that a construction of the instrument which would deprive the state courts of cognizance of those cases, would suppose an alienation or surrender of state power by implication. This result may very properly be arrived at, if the language of the Constitution and the manifest design with which the judicial power was created, seem to require it. Such a construction, however, is not to be adopted, without being supported by reasons which would make a concurrent jurisdiction in the state courts, inconsistent with the objects which the Constitution sought to accomplish. If those objects can be attained, without excluding the concurrent jurisdiction of the state courts over cases which existed before the Constitution, it would seem to be necessary to adopt such a construction as will sustain their concurrent authority.¹

¹ A recent case exhibits very clearly, in one instance, the distinction

§ 122. As to all those cases which spring from the Constitution itself, and which could not have been cognizable by

between a case which arises under a law of the United States and one that does not, in respect to the exercise of original as distinguished from appellate jurisdiction. An action of trover was brought in a state court against a postmaster, for a wrongful refusal to deliver a letter. It was contended that, as the defendant acted under a law of the United States, in refusing to deliver the letter, the state court had no jurisdiction of the action. Mr. Justice Wayne, delivering the opinion of the Supreme Court of the United States, said, "But it is said that the courts of New York had not jurisdiction to try the case. The objection may be better answered by reference to the laws of the United States, in respect to the service to be rendered in the transmission of letters and newspapers by mail, and by the Constitution of the United States, than it can by any general reasoning upon the concurrent civil jurisdiction of the courts of the United States, and the courts of the states, or concerning the exclusive jurisdiction given by the Constitution to the former.

"The United States undertakes, at fixed rates of postage, to convey letters and newspapers for those to whom they are directed, and the postage may be pre-paid by the sender, or be paid when either reach their destination, by the person to whom they are addressed. When tendered by the latter, or by his agent, he has the right to the immediate possession of them, though he has not had before the actual possession. If, then, they be wrongfully withheld for a charge of unlawful postage, it is a conversion for which suit may be brought. This right to sue existing, he may sue in any court having civil jurisdiction of such a case, unless for some cause the suit brought is an exception to the general jurisdiction of the court. Now, the courts in New York having jurisdiction in trover, the case in hand can only be excepted from it by such a case as this having been made one of exclusive jurisdiction in the courts of the United States, by the Constitution of the United States. That such is not the case, we cannot express our view better than Mr. Justice Wright has done in his opinion in this case in the Court of Appeals. After citing the 2d section of the 3d article of the Constitution, he adds, 'This is a mere grant of jurisdiction to the federal courts, and limits the extent of their power, but without words of exclusion or any attempt to oust the state courts of concurrent jurisdiction in any of the specified cases in which concurrent jurisdiction existed prior to the adoption of the Constitution. The apparent object was not to curtail the powers of the state courts, but to define the limits of those granted to the federal judiciary.' We will add, that the legislation of Congress, immediately after the Constitution was carried into operation, confirms the conclusion of the learned judge. We find, in the 25th section of the Judiciary Act of 1789, under

the state courts, very different considerations may apply; for, to exclude the jurisdiction of the state courts over such cases is not an abridgment of a pre-existing authority.¹

§ 123. When we come to examine the language and provisions of the Constitution, in relation to the judicial power, we find three things which may at once arrest our attention: 1st. The jurisdiction, or judicial power, is extended to certain described cases; 2dly. That this judicial power is to be vested in one Supreme Court, and in such inferior courts as Congress may see fit to establish; 3dly. That as to some of the cases, the jurisdiction of the Supreme Court is made original, and as to all the others it is appellate.

§ 124. If we examine the language of the clauses which describe the cases to which the judicial power is to extend, we find a difference of phraseology employed with reference to different classes of those cases. Thus, with regard to the cases where the jurisdiction is supposed to have been conferred on account of the subject-matter, the language is, that the judicial power shall extend to "*all cases*" of the enumerated classes; that is to say, to *all cases* in law or equity arising under the Constitution, laws, or treaties of the United States, *all cases* affecting ambassadors, other public ministers, and consuls, and *all cases* of admiralty and maritime jurisdiction. But when the same section proceeds to the enumeration of those cases where jurisdiction is supposed to be conferred on account of the character of the parties, the language is changed, and the judicial power is declared to ex-

which this case is before us, that such a concurrent jurisdiction in the courts of the states and of the United States was contemplated; for its first provision is for a review of cases adjudicated in the former, 'where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity.' We are satisfied that there was no error in the decision of the Court of Appeals in this case, and the same is affirmed by this court." *Teal v. Felton*, 12 Howard, 284, 292.

¹ The Federalist, No. 82.

tend to "*controversies* between two or more states, between a state and citizens of another state, between citizens of different states," &c. In delivering the opinion of the court in *Martin v. Hunter*, Mr. Justice Story, *arguendo*, suggested that this employment of the expression "all cases," seemingly *ex industria*, denoted an intention to extend the judicial power, either in an original or appellate form, to all cases of the first description; and that in reference to the latter class of cases, the omission of this expression evinced an intention, to leave to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might require.¹

¹ *Martin v. Hunter*, 1 Wheaton, 304, 333. "In what cases (if any)," said the learned Judge, "is this judicial power exclusive, or exclusive at the election of Congress? It will be observed that there are two classes of cases enumerated in the Constitution, between which a distinction seems to be drawn. The first class includes cases arising under the Constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers, and consuls, and cases of admiralty and maritime jurisdiction. In this class, the expression is, that the judicial power shall extend to *all cases*; but in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word '*all*' is dropped seemingly *ex industria*. Here the judicial authority is to extend to controversies (not to *all* controversies) to which the United States shall be a party, &c. From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the Constitution imperatively to extend the judicial power, either in an original or appellate form, to *all cases*; and in the latter class to leave it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.

"The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. In the first place, as to cases arising under the Constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the Constitution, and it could not

§ 125. Probably, what was intended by this suggestion was, that in reference to the cases arising under the Constitution

afterwards be directly conferred on them; for the Constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety. The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations; and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offences in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained; but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever.

"A different policy might well be adopted in reference to the second class of cases; for although it might be fit that the judicial power should extend to all controversies to which the United States should be a party, yet this power might not have been imperatively given, lest it should imply a right to take cognizance of original suits brought against the United States as defendants in their own courts. It might not have been deemed proper to submit the sovereignty of the United States, against their own will, to judicial cognizance, either to enforce rights or to prevent wrongs; and as to the other cases of the second class, they might well be left to be exercised under the exceptions and regulations which Congress might, in their wisdom, choose to apply. It is also worthy of remark, that Congress seem, in a good degree, in the establishment of the present judicial system, to have adopted this distinction. In the first class of cases, the jurisdiction is not limited except by the subject-matter; in the second, it is made materially to depend upon the value in controversy.

"We do not, however, profess to place any implicit reliance upon the distinction which has here been stated and endeavored to be illustrated. It has rather been brought into view in deference to the legislative opinion, which has so long acted upon, and enforced this distinction. But there is, certainly, vast weight in the argument which has been urged, that the Constitution is imperative upon Congress to vest all the judicial power of the United States, in the shape of original jurisdiction, in the

and laws of the United States, cases affecting ambassadors, and cases of admiralty jurisdiction, it was made the imperative duty of Congress to make such provisions as would enable the judicial power of the United States to reach all such cases, either by an original or appellate jurisdiction, or both. If an original jurisdiction were extended to all those cases, the terms of the Constitution would be satisfied, since the judicial power would be extended to them, in that form. If an appellate jurisdiction only were provided, the terms of the Constitution would still be satisfied, if it were provided for all the cases, for the judicial power would, in the appellate form, be extended to those cases. But either in the original or the appellate form, it became, by the words of the Constitution, the imperative duty of Congress to extend the judicial power to all cases of the descriptions enumerated, using their discretion as to the employment of an original or appellate jurisdiction, excepting where the Constitution itself directed the one or the other to be employed.

§ 126. Then, as to cases of the second class, where the Constitution does not say that the judicial power shall extend to *all* the cases of the description enumerated, a like latitude is left to Congress, to employ an original or appellate jurisdiction, as public policy may require, excepting in those cases where the Constitution has itself directed the form of the jurisdiction,

supreme and inferior courts created under its own authority. At all events, whether the one construction or the other prevail, it is manifest that the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority, and in all others, may be made so at the election of Congress. No part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases where, previous to the Constitution, state tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction. Congress, throughout the Judicial Act, and particularly in the 9th, 11th, and 13th sections, have legislated upon the supposition that in all the cases to which the judicial powers of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts."

and the further latitude seems also to be given, to determine what controversies, of the descriptions enumerated, shall be made subject to the jurisdiction, either original or appellate.

But, as the Constitution has declared that the judicial power of the United States shall be vested in the Supreme Court, or in inferior courts to be created by Congress, it follows, that whether an appellate or original jurisdiction be the form in which it is extended to any of the subjects of its cognizance, it must be exercised by the national tribunals alone.

§ 127. From this view of the Constitution, it seems to follow, that wherever Congress undertakes to vest an original jurisdiction in reference to any of the cases where the Constitution declares that the judicial power shall extend to "all cases" of that description, the jurisdiction of the state courts is by implication excluded, if the nature and objects of the jurisdiction are inconsistent with a concurrent authority in the states. Take, for instance, the "cases of admiralty and maritime jurisdiction." Congress might establish either an original or an appellate jurisdiction in admiralty; but reasons of policy and fitness have dictated the establishment of both; and if the original jurisdiction when established must extend to all cases of that description, it follows that no other tribunals than those of the United States can take cognizance of such cases. So, too, with regard to the criminal jurisdiction, which is a branch of the cases arising under the Constitution and laws of the United States. If Congress undertake, as they have done, to create an original jurisdiction for the cognizance of offences against the laws of the United States, and if the jurisdiction so created must, under the Constitution, extend to all such cases, none of them are cognizable in the state courts. In like manner, the Constitution itself provides that the Supreme Court shall have original jurisdiction in "*all cases* affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party;" no discretion is here left to Congress, as to the form in which the judicial power is to

reach these cases, whether by original or appellate jurisdiction, but the form is established by the Constitution, and is an original jurisdiction over all the cases of this description. It would seem, therefore, that none of them can be cognizable in the state courts.

§ 128. On the other hand, where the Constitution has directed that the form in which the judicial power is to extend to any class of cases shall be by an appellate jurisdiction, and has left a discretionary power to Congress to establish or not to establish an original jurisdiction in such cases, and none is established, it is obvious that the Constitution itself fulfils its own requisition, of extending the judicial power to "all" such cases, by means of an appellate jurisdiction; and as there is no action of Congress from which an intention can be inferred to exclude the original jurisdiction of state courts, such cases may well be cognizable therein, if there is nothing in the exercise of such a jurisdiction inconsistent with the constitutional powers conferred by the Constitution upon the national government. Thus, the Constitution declares that in all the other cases belonging to the judicial power, except those of which the Supreme Court has original jurisdiction, it shall have appellate jurisdiction. Original jurisdiction is thus left to be established, by Congress, for these cases, or not to be established, as Congress may determine. If, with respect to some of the classes of cases, it establishes no original jurisdiction, the judicial power still extends to them through the appellate jurisdiction of the Supreme Court, although they may originate in the state courts. As, for example, with regard to that large branch of the class of cases arising under the Constitution and laws of the United States, in which their construction or supremacy is incidentally drawn in question;—Congress has not established, and from the nature of the case, could not establish, an original jurisdiction that would reach such cases, which must be commenced and prosecuted to a certain stage before it appears that such a question arises. They are

reached, however, by the appellate power of the Supreme Court, which is extended to all of them; and consequently they may originate lawfully in the state tribunals. But if, from the nature of the case, it is practicable for Congress to establish an original jurisdiction for particular cases arising under the Constitution and laws of the United States, as it is, where the right to be tried arises wholly and exclusively under the authority of the Union—as in the cases of patents and copyrights—there, the establishment of such an original jurisdiction, which must embrace all the cases, seems to exclude the jurisdiction of the state courts over any of those cases.

§ 129. From this course of reasoning it is suggested, that in regard to the several classes of cases, to “all” of which the Constitution imperatively declares that the judicial power shall extend, if an original jurisdiction is established by the Constitution itself, or by Congress in the exercise of a discretion left to it by the Constitution, that jurisdiction may be regarded as exclusive of the state courts. For example, it is not perceived how Congress could constitutionally establish an original jurisdiction in admiralty for cases of a certain amount, and leave other admiralty cases of a less amount to the original jurisdiction of the state courts. If Congress establishes any original jurisdiction in admiralty, it must be complete, within the sense of the Constitution, that is, it must extend to “all” the cases. It might seem, indeed, on first impression, that if the original jurisdiction established by Congress included a part of the admiralty cases, and the appellate jurisdiction of the Supreme Court embraced the residue, the requisition of the Constitution, that the judicial power should extend to “all” admiralty cases, would be satisfied. But to this view it is to be answered, that the great purpose for which the Constitution has placed cases of this class under the cognizance of the national tribunals, is as applicable to cases of one amount as to those of another; and the Constitution has not left to Congress a discretion to regard that

purpose, in establishing original jurisdiction in one case, and not to regard it in establishing original jurisdiction in another case. If it can be supposed that Congress is at liberty to refrain altogether from establishing original jurisdiction in admiralty, and to leave the judicial power to operate only in the appellate form, the question still remains, whether, if original jurisdiction is exerted at all, it must not be exerted as to "all" the cases.¹

¹ In *Martin v. Hunter* (*ub. supr.*) Mr. Justice Story said, "If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power*. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to all; for the Constitution has not singled out any class on which Congress are bound to act in preference to others.

"The next consideration is as to the courts in which the judicial power shall be vested. It is manifest that a Supreme Court must be established; but whether it be equally obligatory to establish inferior courts, is a question of some difficulty. If Congress may lawfully omit to establish inferior courts, it might follow that, in some of the enumerated cases, the judicial power could nowhere exist. The Supreme Court can have original jurisdiction in two classes of cases only, viz., in cases affecting ambassadors, other public ministers, and consuls, and in cases in which a state is a party. Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself; and if in any of the cases enumerated in the Constitution, the state courts did not then possess jurisdiction, the appellate jurisdiction of the Supreme Court (admitting that it could act on state courts) could not reach those cases, and, consequently, the injunction of the Constitution, that the judicial power '*shall be vested,*' would be disobeyed. It would seem, therefore, to follow, that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the Constitution, is *exclusively* vested in the United States, and of which the Supreme Court cannot take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.

"This construction will be fortified by an attentive examination of the second section of the third article. The words are 'the judicial power

§ 130. But however this may be, it would seem to be quite clear that the Constitution authorizes Congress to make the

shall extend, &c. Much minute and elaborate criticism has been employed upon these words. It has been argued that they are equivalent to the words 'may extend,' and that 'extend' means to widen to new cases not before within the scope of the power. For the reasons which have been already stated, we are of opinion that the words are used in an imperative sense. They import an absolute grant of judicial power. They cannot have a relative signification applicable to powers already granted; for the American *people* had not made any previous grant. The Constitution was for a new government, organized with new substantive powers, and not a mere supplementary charter to a government already existing. The Confederation was a compact between states; and its structure and powers were wholly unlike those of the national government. The Constitution was an act of the people of the United States to supersede the Confederation, and not to be engrafted on it, as a stock through which it was to receive life and nourishment.

"If, indeed, the relative signification could be fixed upon the term 'extend,' it could not (as we shall hereafter see) subserve the purposes of the argument in support of which it has been adduced. This imperative sense of the words 'shall extend,' is strengthened by the context. It is declared that 'in all cases affecting ambassadors, &c., that the Supreme Court *shall have* original jurisdiction.' Could Congress withhold original jurisdiction in these cases from the Supreme Court? The clause proceeds—'in all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make.' The very exception here shows that the framers of the Constitution used the words in an imperative sense. What necessity could there exist for this exception if the preceding words were not used in that sense? Without such exception, Congress would, by the preceding words, have possessed a complete power to regulate the appellate jurisdiction, if the language were only equivalent to the words 'may have' appellate jurisdiction. It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable Congress to regulate and restrain the appellate power, as the public interests might from time to time require.

"Other clauses in the Constitution might be brought in aid of this construction; but a minute examination of them cannot be necessary, and would occupy too much time. It will be found that, whenever a particular object is to be effected, the language of the Constitution is always imperative, and cannot be disregarded without violating the first principles of public duty. On the other hand, the legislative powers are

jurisdiction of their own courts exclusive in this class of cases, by express provision ; for, since it declares that the judicial power shall extend to "all" cases of these descriptions, either in an original or appellate form, or both, it follows that if Congress see fit to establish an original jurisdiction, embracing all the cases of any one of these descriptions, and an appellate jurisdiction embracing only a part of them, they must have authority to make the original jurisdiction exclusive, otherwise there might be cases originating in a state court, to which the judicial power of the United States would not extend.

§ 131. It is upon these principles that the actual jurisdiction of the courts of the United States seems generally to have been arranged, from the origin of the government. As to the cases arising under the Constitution, laws, and treaties of the United States, where it has been practicable to establish an original jurisdiction in the courts of the United States, for cases which arise directly and necessarily from a law of the United States, such a jurisdiction has been created, and has generally been made exclusive. Thus, the original jurisdiction over crimes and offences against the laws of the United States, over seizures for breaches of revenue laws, and over cases arising under the patent and copyright acts, has been made exclusive either in the Circuit or District Courts.¹ On the other hand, where it has not been practi-

given in language which implies discretion, as from the nature of legislative power such a discretion must ever be exercised.

"It being, then, established that the language of this clause is imperative, the next question is as to the cases to which it shall apply. The answer is found in the Constitution itself. The judicial power shall extend to all the cases enumerated in the Constitution. As the mode is not limited, it may extend to all such cases, in any form, in which judicial power may be exercised. It may, therefore, extend to them in the shape of original or appellate jurisdiction, or both ; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other."

¹ Judiciary Act of 20th Sept., 1789, § 9, 11 ; Act of February 15, 1819.

cable to establish an original jurisdiction for other classes of cases arising under the Constitution and laws of the United States—such as those where the construction or supremacy of the Constitution or laws are drawn in question incidentally in the progress of a cause—the judicial power has been extended to them in the appellate form, and no original jurisdiction has been established.¹ In like manner, the original admiralty jurisdiction has been expressly made exclusive;² and so has the original jurisdiction of the Supreme and District Courts, in suits against ambassadors, other public ministers, and consuls.³

§ 132. If, then, it is in the power of Congress to make the original jurisdiction of the courts of the United States exclusive in those cases, to all of which the Constitution declares the judicial power shall extend, the question arises, if this power be not exercised expressly, or by implication, whether there will be a concurrent jurisdiction in the state courts. In *Cohens v. Virginia*, Mr. Ch. Justice Marshall, delivering the opinion of the court, said, “The propriety of intrusting the construction of the Constitution and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet been drawn in question. It seems to be a corollary from this political axiom, that the

See, as to the exclusive jurisdiction in cases of seizure, *Slocumb v. Mayberry*, 2 Wheat. 1; see further, as to the patent and copyright acts, *post*.

¹ Judiciary Act, § 25.

² Judiciary Act, § 9. See, as to the power of Congress to make the admiralty jurisdiction exclusive, *U. States v. Bevens*, 3 Wheat. 336, 386.

³ *Ibid.* § 9, 13. In *Davis v. Packard*, 7 Peters, 276, 280, the Supreme Court said, “As an abstract question, it is difficult to understand on what ground a state court can claim jurisdiction of civil suits against foreign consuls. By the Constitution, the judicial power extends to all cases affecting ambassadors, and other public ministers and consuls. And the Judiciary Act of 1789, gives to the District Courts of the United States, exclusively of the courts of the several states, jurisdiction of all suits against consuls and vice-consuls, except for certain offences mentioned in the act.”

federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them by the state tribunals.”¹ That the judicial power will extend through the appellate jurisdiction to cases of this description, even where Congress refrains from exercising its power of creating an exclusive original jurisdiction, can admit of no doubt. It is equally clear, that if Congress vests an exclusive original jurisdiction in its own tribunals, in express terms, the state courts can exercise no concurrent jurisdiction in the same class of cases. But where such an exclusive jurisdiction is not expressly created, two questions may arise,—first, whether the creation of any original jurisdiction in the courts of the United States does or does not by implication exclude the jurisdiction of the state courts; secondly, if it does not exclude the jurisdiction of the state courts, are there any, and what cases, in which the state courts can exercise a concurrent jurisdiction? The doctrine laid down by “The Federalist” on this subject was, that the states retained all pre-existing authority or jurisdiction, which they had before the adoption of the Constitution, except where it was taken away, either by an exclusive authority granted in express terms to the Union, or in a case where a particular authority was granted to the Union and the exercise of a like authority was prohibited to the states, or where an authority was granted to the Union with which a similar authority in the states would be incompatible. This doctrine, it was admitted, was not so applicable to the judicial as to the legislative powers of the government; but it was thought to be sufficiently accurate to apply it to the judicial power, and it was thought that it would lead to the conclusion that the state courts would retain a concurrent jurisdiction in those descriptions of causes, of which they had previous cognizance, but that it was not so clear that they would have jurisdiction in cases which were to grow out of or be peculiar to the Constitution. The writer goes on, however, to express the opinion that Congress might, in the

¹ 6 Wheaton, 415.

course of legislation upon the *objects* intrusted to their direction, commit the decision of causes arising upon a particular regulation, exclusively to the jurisdiction of the federal courts, if they should see fit, but that the state courts would be divested of no part of their primitive jurisdiction, further than might relate to an appeal; and that in every cause in which the state courts were not expressly excluded by the legislation of Congress, they would of course take cognizance of the causes to which that legislation might give birth.¹

§ 133. It would seem that there is some inconsistency involved in these positions; for it is not perceived that there can be any real distinction between cases which grow out of, or are peculiar to the Constitution, and cases which grow out of the Acts of Congress passed in pursuance of the powers conferred by the Constitution. All are equally placed within the judicial power of the Union; and if the cases arise under the Constitution, or under a law of the United States, although the particular power exercised in the particular law may not be exclusive of a similar power in the states, the cases do not arise under state laws, and were not within the pre-existing jurisdiction of the state courts. If a state legislates, and may lawfully legislate, upon a subject which is among those included within the powers of Congress, then, in the absence of any national legislation, there will be cases which unquestionably belong to the state jurisdictions. But where Congress has legislated upon a particular subject committed to it by the Constitution, whether the power that is exercised be or be not exclusive, or be or be not so exercised, that the exercise of a similar power by the states is incompatible, and, therefore, inadmissible, the cases arising under the national legislation must belong to the judicial power of the Union, and cannot be committed by Congress to the state courts.²

§ 134. But a much more delicate and difficult question may

¹ The Federalist, No. 82.

² *Houston v. Moore*, 5 Wheat. 1.

arise, and that is, where an Act of Congress has created a particular offence, and provided for its punishment, without declaring in express terms that the jurisdiction shall be exclusive, whether it is competent to a state to try and punish the same offence in a state court, by virtue of a state law. This question arose in the case of *Houston v. Moore*. The laws of the United States, providing for the calling forth of the militia of the state by the President, in certain cases, had inflicted certain penalties upon delinquent militia-men who should fail to obey the orders of the President, to be determined and adjudged *by a court-martial*. A law of the State of Pennsylvania inflicted the same penalty for the same offence, and provided for the trial of the delinquents by a state court-martial, and that a list of the delinquents fined by such state court should be furnished to the Marshal of the United States, and to the Comptroller of the Treasury of the United States, in order that the further proceedings to be had thereon by the laws of the United States might be completed. Two questions were thus presented.

§ 135. 1st. Whether the State of Pennsylvania could constitutionally legislate in respect to delinquent militia-men called into the service of the United States, and prescribe the punishment to which they should be subjected; and 2dly, admitting that it could not, whether the state court-martial had jurisdiction over the subject, so as to enforce the laws of Congress. As to the first question, a majority of the Supreme Court of the United States were of opinion that as Congress had legislated upon the subject of calling the militia into the service of the United States, as far as it thought proper, the power of legislation by the states upon the same subject was excluded;¹ but that (2d) the state

¹ 5 Wheaton, 1, 12. The following was the reasoning of Mr. Justice Washington, who delivered the opinion of a majority of the court, upon this branch of the case: "There is but one question in this cause, and it is, whether the act of the legislature of Pennsylvania, under the authority of

court-martial had a concurrent jurisdiction with the tribunal pointed out by the Acts of Congress, to try a militia-man

which the plaintiff in error was tried, and sentenced to pay a fine, is repugnant to the Constitution of the United States or not?

"But, before this question can be clearly understood, it will be necessary to inquire, 1. What are the powers granted to the general government, by the Constitution of the United States, over the militia? and, 2. To what extent have they been assumed and exercised?

"1. The Constitution declares that Congress shall have power to provide for calling forth the militia in three specified cases: for organizing, arming, and disciplining them; and for governing such part of them as may be employed in the service of the United States; reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress. It is further provided that the President of the United States shall be commander of the militia, when called into the actual service of the United States.

"2. After the Constitution went into operation, Congress proceeded by many successive acts to exercise these powers, and to provide for all the cases contemplated by the Constitution.

"The Act of the 2d of May, 1792, which is re-enacted almost verbatim by that of the 28th of February, 1795, authorizes the President of the United States, in case of invasion, or of imminent danger of it, or when it may be necessary for executing the laws of the United States, or to suppress insurrections, to call forth such number of the militia of the state most convenient to the scene of action, as he may judge necessary, and to issue his orders for that purpose, to such officer of the militia as he shall think proper. It prescribes the amount of pay and allowances of the militia so called forth, and employed in the service of the United States, and subjects them to the rules and articles of war applicable to the regular troops. It then proceeds to prescribe the punishment to be inflicted upon delinquents, and the tribunal which is to try them, by declaring, that every officer or private who should fail to obey the orders of the President, in any of the cases before recited, should be liable to pay a certain fine, to be determined and adjudged by a court-martial, and to be imprisoned, by a like sentence, on failure of payment. The courts-martial for the trial of militia, are to be composed of militia officers only, and the fines to be certified by the presiding officer of the court, to the marshal of the district, and to be levied by him, and also to the supervisor, to whom the fines are to be paid over.

"The Act of the 18th of April, 1814, provides, that courts-martial, to be composed of militia officers only, for the trial of militia, *drafted, detached, and called forth* for the service of the United States, whether

who had disobeyed the call of the President, and to enforce the laws of Congress against such delinquent. Mr. Justice

acting in conjunction with the regular forces or otherwise, shall, whenever necessary, be appointed, held, and conducted in the manner prescribed by the rules and articles of war, for appointing, holding, and conducting courts-martial for the trial of delinquents in the army of the United States. Where the punishment prescribed, is by stoppage of pay, *or imposing a fine* limited by the amount of pay, the same is to have relation to the monthly pay existing *at the time the offence was committed*. The residue of the act is employed in prescribing the manner of conducting the trial; the rules of evidence for the government of the court; the time of service, and other matters not so material to the present inquiry. The only remaining Act of Congress which it will be necessary to notice in this general summary of the laws, is that of the 8th of May, 1792, for establishing a uniform militia in the United States. It declares who shall be subject to be enrolled in the militia, and who shall be exempt; what arms and accoutrements the officers and privates shall provide themselves with; arranges them into divisions, brigades, regiments, battalions, and companies, in such manner as the state legislatures may direct; declares the rules of discipline by which the militia is to be governed, and makes provision for such as should be disabled whilst in the actual service of the United States. The pay and subsistence of the militia, whilst in service, are provided for by other Acts of Congress, and particularly by one passed on the 3d of January, 1795.

“The laws which I have referred to, amount to a full execution of the powers conferred upon Congress by the Constitution. They provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasion. They also provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; leaving to the states, respectively, the appointment of the officers, and the authority of training them according to the discipline prescribed by Congress.

“This system may not be formed with as much wisdom as, in the opinion of some, it might have been, or as time and experience may hereafter suggest. But, to my apprehension, the whole ground of Congressional legislation is covered by the laws referred to. The manner in which the militia is to be organized, armed, disciplined, and governed, is fully prescribed; provisions are made for drafting, detaching, and calling forth the state quotas, when required by the President. The President's orders may be given to the chief executive magistrate of the state, or to any militia officer he may think proper; neglect, or refusal to obey orders, is declared to be an offence against the laws of the United States, and subjects the offender to trial, sentence, and punishment, to

Washington, who delivered the opinion of a majority of the court,¹ said: "There still remains another question to be

be adjudged by a court-martial, to be summoned in the way pointed out by the articles and rules of war; and the mode of proceeding to be observed by these courts, is detailed with all necessary perspicuity.

"If I am not mistaken in this view of the subject, the way is now open for the examination of the great question in the cause. Is it competent to a court-martial, deriving its jurisdiction under state authority, to try and to punish militia-men, drafted, detached, and called forth by the President into the service of the United States, who have refused or neglected to obey the call?

"In support of the judgment of the court below, I understand the leading arguments to be the two following: 1. That militia-men, when called into the service of the United States by the President's orders, communicated either to the executive magistrate, or to any inferior militia officer of a state, are not to be considered as being in the service of the United States until they are mustered at the place of rendezvous. If this be so, then, 2dly. The state retains a right, concurrent with the government of the United States, to punish his delinquency. It is admitted on the one side, that so long as the militia are acting under the military jurisdiction of the state to which they belong, the powers of legislation over them are concurrent in the general and state government. Congress has power to provide for organizing, arming, and disciplining them; and this power being unlimited, except in the two particulars of officering and training them, according to the discipline to be prescribed by Congress, it may be exercised to any extent that may be deemed necessary by Congress. But, as state militia, the power of the state government to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, remains with the states, subordinate, nevertheless, to the paramount law of the general government operating upon the same subject. On the other side, it is conceded that after a detachment of the militia have been called forth, and have entered into the service of the United States, the authority of the general government over such detachment is exclusive. This is also obvious. Over the national militia, the state governments never had, or could have, jurisdiction. None such is conferred by the Constitution of the United States; consequently, none such can exist.

"The first question, then, is, at what time, and under what circumstances, does a portion of militia, drafted, detached, and called forth by the President, enter into the service of the United States, and change their character from state to national militia? That Congress might by

¹ *Houston v. Moore*, 5 Wheaton, 1, 24.

considered, which more immediately involves the merits of this cause. Admit that the legislature of Pennsylvania

law have fixed the period, by confining it to the draft; the order given to the chief magistrate, or other militia officer of the state; to the arrival of the men at the place of rendezvous; or to any other circumstance, I can entertain no doubt. This would certainly be included in the more extensive powers of calling forth the militia, organizing, arming, disciplining, and governing them. But, has Congress made any declaration on this subject, and in what manner is the will of that body, as expressed in the before-mentioned laws, to be construed? It must be conceded that there is no law of the United States which declares, in express terms, that the organizing, arming, and equipping a detachment, on the order of the President to the state militia officers, or to the militia-men personally, places them in the service of the United States. It is true, that the refusal or neglect of the militia to obey the orders of the President, is declared to be an offence against the United States, and subjects the offender to a certain prescribed punishment. But this flows from the power bestowed upon the general government to call them forth; and, consequently, to punish disobedience to a legal order; and by no means proves that the call of the President places the detachment in the service of the United States. But, although Congress has been less explicit on this subject than they might have been, and it could be wished they had been, I am, nevertheless, of opinion, that a fair construction of the different militia laws of the United States, will lead to a conclusion, that something more than organizing and equipping a detachment, and ordering it into service, was considered as necessary to place the militia in the service of the United States. That preparing a detachment for such service, does not place it in the service, is clearly to be collected from the various temporary laws which have been passed, authorizing the President to require of the state executives to organize, arm, and equip their state quotas of militia for the service of the United States. Because they all provide that the requisition shall be to hold such quotas in readiness to march at a moment's warning; and some, if not all of them, authorize the President to call *into actual* service any part, or the whole of said quotas, or detachments; clearly distinguishing between the orders of the President to *organize, and hold the detachments in readiness for service*, and their entering *into service*.

"The Act of the 28th of February, 1795, declared, that the militia *employed in the service* of the United States, shall receive the same pay and allowance as the troops of the United States, and shall be subject to the same rules and articles of war. The provisions made for disabled militia-men, and for their families, in case of their death, are, by other laws, confined to such militia as are, or have been in actual service.

could not constitutionally legislate in respect to delinquent militia-men, and to prescribe the punishment to which they

There are other laws which seem very strongly to indicate the *time* at which they are considered as being in service. Thus, the Act of the 28th of February, 1795, declares, that a militia-man called into the service of the United States, shall not be compelled to serve more than three months *after his arrival at the place of rendezvous*, in any one year. The 8th section of the Act of the 18th of April, 1814, declares, that the militia, *when called into the service of the United States*, if, in the President's opinion, the public interest requires it, may be compelled to serve for a time not exceeding six months, *after their arrival at the place of rendezvous*, in any one year; and, by the 10th section, provision is made for the expenses which may be incurred by marching the militia *to their places of rendezvous*, in pursuance of a requisition of the President, and they are to be adjusted and paid in like manner as those incurred after their arrival at the rendezvous. The 3d section of the Act of the 2d of January, 1795, provides, that whenever the militia shall be called into the actual service of the United States, their pay shall be deemed to commence *from the day of their appearing at the place of battalion, regimental, or brigade rendezvous*, allowing a day's pay and ration for every fifteen miles from their homes to said rendezvous.

"From this brief summary of the laws, it would seem that *actual service* was considered by Congress as the criterion of national militia; and that the service did not commence until the arrival of the militia at the place of rendezvous. That is the *terminus a quo*, the service, the pay, and subjection to the articles of war, are to commence and continue. If the service, in particular, is to continue for a certain length of time, from a certain day, it would seem to follow, almost conclusively, that the service commenced on that, and not on some prior day. And, indeed, it would seem to border somewhat upon an absurdity, to say that a militia-man was in the service of the United States at any time, who, so far from entering into it for a single moment, had refused to do so, and who never did any act to connect him with such service. It has already been admitted that, if Congress had pleased so to declare, a militia-man, called into the service of the United States, might have been held and considered as being constructively in that service, though not actually so; and might have been treated in like manner as if he had appeared at the place of rendezvous. But Congress has not so declared, nor have they made any provision applicable to such a case; on the contrary, it would appear that a fine, to be paid by the delinquent militia-man, was deemed an equivalent for his services, and an atonement for his disobedience.

"If, then, a militia-man, called into the service of the United States, shall refuse to obey the order, and is, consequently, not to be considered

should be subject, had the state court-martial jurisdiction over the subject, so as to enforce the laws of Congress against these delinquents?

as in the service of the United States, or removed from the military jurisdiction of the state to which he belongs, the next question is, is it competent to the state to provide for trying and punishing him for his disobedience by a court-martial, deriving its authority under the state? It may be admitted at once, that the militia belong to the states respectively in which they are enrolled, and that they are subject, both in their civil and military capacities, to the jurisdiction and laws of such state, except so far as those laws are controlled by Acts of Congress constitutionally made. Congress has power to provide for organizing, arming, and disciplining the militia; and it is presumable that the framers of the Constitution contemplated a full exercise of all these powers. Nevertheless, if Congress had declined to exercise them, it was competent to the state governments to provide for organizing, arming, and disciplining their respective militia in such manner as they might think proper. But Congress has provided for all these subjects in the way which that body must have supposed the best calculated to promote the general welfare, and to provide for the national defence. After this, can the state governments enter upon the same ground, provide for the same objects as they may think proper, and punish in their own way violations of the laws they have so enacted? The affirmative of this question is asserted by the defendant's counsel, who, it is understood, contend that, unless such state laws are in direct contradiction to those of the United States, they are not repugnant to the Constitution of the United States.

"From this doctrine, I must, for one, be permitted to dissent. The two laws may not be in such absolute opposition to each other, as to render the one incapable of execution, without violating the injunction of the other; and yet the will of the one legislature may be in direct collision with that of the other. This will is to be discovered as well by what the legislature has not declared, as by what they have expressed. Congress, for example, has declared that the punishment for disobedience of the Act of Congress shall be a certain fine; if that provided by the state legislature for the same offence be a similar fine, with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution, and may be said, therefore, not to be repugnant to it. But, surely, the will of Congress is, nevertheless, thwarted and opposed.

"This question does not so much involve a contest for power between the two governments, as the rights and privileges of the citizen, secured to him by the Constitution of the United States, the benefit of which he may lawfully claim.

"If in a specified case, the people have thought proper to bestow

"This, it will be seen, is a different question from that which has been just examined. That respects the power of a state legislature to legislate upon a subject on which Congress has declared its will. This concerns the jurisdiction of a state military tribunal to adjudicate in a case which depends on a law of Congress, and to enforce it.

certain powers on Congress as the safest depository of them, and Congress has legislated within the scope of them, the people have reason to complain that the same powers should be exercised at the same time by the state legislature. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and, at the same time, compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ. If the one impose a certain punishment for a certain offence, the presumption is, that this was deemed sufficient, and, under all circumstances, the only proper one. If the other legislature impose a different punishment, in kind or degree, I am at a loss to conceive how they can both consist harmoniously together.

"I admit that a legislative body may, by different laws, impose upon the same person, for the same offence, different and cumulative punishment; but then it is the will of the same body to do so, and the second, equally with the first law, is the will of that body. There is, therefore, and can be, no opposition of wills. But the case is altogether different, where the laws flow from the wills of distinct, co-ordinate bodies.

"This course of reasoning is intended as an answer to what I consider a novel and unconstitutional doctrine, that in cases where the state governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which Congress has acted, provided the two laws are not in terms, or in their operation, contradictory and repugnant to each other.

"Upon the subject of the militia, Congress has exercised the powers conferred on that body by the Constitution as fully as was thought right, and has thus excluded the power of legislation by the states on these subjects, except so far as it has been permitted by Congress; although it should be conceded that important provisions have been omitted, or that others which have been made might have been more extended, or more wisely devised."

“It has been already shown that Congress has prescribed the punishment to be inflicted on a militia-man detached and called forth, but who had refused to march; and has also provided that courts-martial for the trial of such delinquents, to be composed of militia officers only, shall be held and conducted in the manner pointed out by the rules and articles of war.

“That Congress might have vested the exclusive jurisdiction in courts-martial, to be held and conducted as the laws of the United States have prescribed, will, I presume, hardly be questioned. The offence to be punished grows out of the Constitution and laws of the United States, and is, therefore, clearly a case which might have been withdrawn from the concurrent jurisdiction of the state tribunals. But an exclusive jurisdiction is not given to courts-martial, deriving their authority under the national government, by express words;—the question, then (and I admit the difficulty of it), occurs, Is this a case in which the state courts-martial could exercise jurisdiction?

“Speaking upon the subject of the federal judiciary, ‘The Federalist’ distinctly asserts the doctrine, that the United States, in the course of legislation upon the objects intrusted to their direction, may commit the decision of causes arising upon a particular regulation to the federal courts solely, if it should be deemed expedient; yet, that in every case in which the state tribunals should not be expressly excluded by the acts of the national legislature, they would, of course, take cognizance of the causes to which those acts might give birth.

“I can discover, I confess, nothing unreasonable in this doctrine; nor can I perceive any inconvenience which can grow out of it, so long as the power of Congress to withdraw the whole, or any part of those cases, from the jurisdiction of the state courts is, as I think it must be, admitted.

“The practice of the general government seems strongly to confirm this doctrine; for, at the first session of Congress which commenced after the adoption of the Constitution,

the judicial system was formed; and the exclusive and concurrent jurisdiction conferred upon the courts created by that law were clearly distinguished and marked: showing that, in the opinion of that body, it was not sufficient to vest an exclusive jurisdiction, where it was deemed proper, merely by a grant of jurisdiction generally. In particular, this law grants exclusive jurisdiction to the circuit courts of all crimes and offences cognizable under the authority of the United States, except where the laws of the United States should otherwise provide; and this will account for the proviso in the Act of the 24th of February, 1807, ch. 75, concerning the forgery of the notes of the Bank of the United States, 'that nothing in that act contained should be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states over offences made punishable by that act.' A similar provision is to be found in the Act of the 21st of April, 1806, ch. 49, concerning the counterfeiters of the current coin of the United States. It is clear that, in the opinion of Congress, this saving was necessary, in order to authorize the exercise of concurrent jurisdiction by the state courts over those offences; and there can be very little doubt but that this opinion was well founded. The Judiciary Act had vested in the federal courts exclusive jurisdiction of all offences cognizable under the authority of the United States, unless where the laws of the United States should otherwise direct. The states could not, therefore, exercise a concurrent jurisdiction in those cases, without coming into direct collision with the laws of Congress. But by these savings Congress did provide that the jurisdiction of the federal courts in the specified cases should not be exclusive; and the concurrent jurisdiction of the state courts was instantly restored, so far as, under state authority, it could be exercised by them.

"There are many other Acts of Congress which permit jurisdiction over the offences therein described, to be exercised by state magistrates and courts; not, I presume, because such permission was considered to be necessary under

the Constitution, in order to vest a concurrent jurisdiction in those tribunals; but because, without it, the jurisdiction was exclusively vested in the national courts by the Judiciary Act, and consequently could not be otherwise exercised by the state courts. For I hold it to be perfectly clear, that Congress cannot confer jurisdiction upon any courts, but such as exist under the Constitution and laws of the United States, although the state courts may exercise jurisdiction in cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts.

“What, then, is the real object of the law of Pennsylvania which we are considering? I answer, to confer authority upon a state court-martial to enforce the laws of the United States against delinquent militia-men, who had disobeyed the call of the President to enter into the service of the United States; for except the provisions for vesting this jurisdiction in such a court, this act is, in substance, a reenactment of the Acts of Congress, as to the description of the offence, the nature and extent of the punishment, and the collection and appropriation of the fines imposed.

“Why might not this court-martial exercise the authority thus vested in it by this law? As to crimes and offences against the United States, the law of Congress had vested the cognizance of them exclusively in the federal courts. The state courts, therefore, could exercise no jurisdiction whatever over such offences, unless where, in particular cases, other laws of the United States had otherwise provided; and wherever such provision was made, the claim of exclusive jurisdiction to the particular cases was withdrawn by the United States, and the concurrent jurisdiction of the state courts was, *eo instanti*, restored, not by way of grant from the national government, but by the removal of a disability before imposed upon the state tribunals.

“But military offences are not included in the Act of Congress conferring jurisdiction upon the circuit and district courts; no person has ever contended that such offences are cognizable before the common law courts. The militia laws

have, therefore, provided, that the offence of disobedience to the President's call upon the militia shall be cognizable by a court-martial of the United States; but an exclusive cognizance is not conferred upon that court, as it had been upon the common law courts as to other offences, by the Judiciary Act. It follows, then, as I conceive, that jurisdiction over this offence remains to be concurrently exercised by the national and state courts-martial, since it is authorized by the laws of the state, and not prohibited by those of the United States. Where is the repugnance of the one law to the other? The jurisdiction was clearly concurrent over militia-men, not engaged in the service of the United States; and the Acts of Congress have not disturbed this state of things, by asserting an exclusive jurisdiction. They certainly have not done so in terms; and I do not think that it can be made out by any fair construction of them. The Act of 1795 merely declares that this offence shall be tried by a *court-martial*. This was clearly not exclusive; but, on the contrary, it would seem to import, that such court might be held under national, or state authority.

“The Act of 1814 does not render the jurisdiction necessarily exclusive. It provides, that courts-martial for the trial of militia, drafted and called forth, shall, *when necessary*, be appointed, held, and conducted, in the manner prescribed by the rules of war.

“If the mere assignment of jurisdiction to a particular court, does not necessarily render it exclusive, as I have already endeavored to prove, then it would follow, that this law can have no such effect; unless, indeed, there is a difference in this respect between the same language, when applied to military, and to civil courts; and if there be a difference, I have not been able to perceive it. But the law uses the expression ‘when necessary.’ How is this to be understood? It may mean, I acknowledge, whenever there are delinquents to try; but, surely, if it import no more than this, it was very unnecessarily used, since it would have been sufficient to say, that courts-martial for the trial of militia

called into service, should be formed and conducted in the manner prescribed by the law. The Act of 1795 had declared who were liable to be tried, but had not said with precision before what court the trial should be had. This act describes the court; and the two laws being construed together, would seem to mean that every such delinquent as is described in the Act of 1795, should pay a certain fine, to be determined and adjudged by a court-martial, to be composed of militia officers, to be appointed and conducted in the manner prescribed by the articles of war. These words, *when necessary*, have no definite meaning, if they are confined to the existence of cases for trial before the court. But if they be construed (as I think they ought to be), to apply to trials rendered necessary by the omission of the states to provide for state courts-martial to exercise a jurisdiction in the case, or of such courts to take cognizance of them, when so authorized, they have an important, and a useful meaning. If the state court-martial proceeds to take cognizance of the cases, it may not appear necessary to the proper officer in the service of the United States, to summon a court to try the same cases; if they do not, or for want of authority cannot try them, then it may be deemed necessary to convene a court-martial under the articles of war, to take and to exercise the jurisdiction.

“There are two objections which were made by the plaintiff’s counsel to the exercise of jurisdiction in this case by the state court-martial which remain to be noticed:

“1. It was contended, that, if the exercise of this jurisdiction be admitted, that the sentence of the court would either oust the jurisdiction of the United States’ court-martial, or might subject the accused to be twice tried for the same offence. To this I answer, that, if the jurisdiction of the two courts be concurrent, the sentence of either court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other, as much so as the judgment of a state court, in a civil case of concurrent jurisdiction, may be pleaded in bar of an action for the same cause, instituted in a circuit court of the United States.

"Another objection is, that if the state court-martial had authority to try these men, the Governor of that state, in case of conviction, might have pardoned them. I am by no means satisfied that he could have done so; but, if he could, this would only furnish a reason why Congress should vest the jurisdiction in these cases exclusively in a court-martial acting under the authority of the United States.

"Upon the whole, I am of opinion, after the most laborious examination of this delicate question, that the state court-martial had a concurrent jurisdiction with the tribunal pointed out by the Acts of Congress to try a militia-man who had disobeyed the call of the President, and to enforce the laws of Congress against such delinquent; and that this authority will remain to be so exercised until it shall please Congress to vest it exclusively elsewhere, or until the State of Pennsylvania shall withdraw from their court-martial the authority to take such jurisdiction. At all events, this is not one of those clear cases of repugnance to the Constitution of the United States, where I should feel myself at liberty to declare the law to be unconstitutional; the sentence of the court *coram non judice*; and the judgment of the Supreme Court of Pennsylvania erroneous on these grounds."

§ 136. It will be perceived, that in this opinion it was held that the Acts of Congress had not asserted any exclusive jurisdiction, either expressly or by fair implication; that they merely directed the offence to be tried by a *court-martial*; and that they therefore imported that such court might be held under national or state authority. The case is therefore an authority for the position, that when an Act of Congress, passed in pursuance of a constitutional power, has created an offence, and prescribed its punishment, but has not expressly directed that it shall be tried in a national tribunal, a state court may entertain jurisdiction and enforce the penalty. But it must be admitted, that the reasoning of the court which led to this conclusion, is far from being satisfactory. The judgment of the court is

placed expressly upon the ground that the law of Pennsylvania, so far as it undertook to legislate upon the same subject, was repugnant to the constitutional legislation of Congress; and, therefore, the law which the state court undertook to enforce, was not the state law, but the Acts of Congress. The latter, it is true, did not in terms create an exclusive jurisdiction, and therefore, it is said, the jurisdiction of the state courts, as well as those of the Union, attached to the case. But the question is, whether, under the provisions of the Constitution of the United States, where a law of the United States creates an offence and directs it to be punished in a court-martial, it is not necessarily implied that the court-martial is to be one held under national authority; in other words, whether there can be any implication in favor of the jurisdiction of state courts, in cases which arise directly under a law of the United States, and which do not exist but by reason of such a law, even where Congress does not expressly make the jurisdiction exclusive.

§ 137. The provision of the Constitution, that all cases which arise under the laws of the United States shall belong to the judicial power of the United States, may be supposed to make it necessary that in the creation of offences and the enactment of penalties, Congress should look solely to tribunals of their own creation for the means of adjudication and punishment; and this provision, therefore, would seem to render it necessary, in cases where Congress have not expressly declared an exclusive jurisdiction, to adopt a presumption in favor of the exclusive jurisdiction of the national tribunals, rather than a presumption in favor of the concurrent jurisdiction of state tribunals. The latter presumption can, in such a case, borrow no force from an antecedent jurisdiction in the state courts, for no such antecedent jurisdiction existed, in cases which arise directly under a law of the United States, and where the law of the United States is sought to be enforced.¹

¹ Mr. Justice Story, who dissented from the opinion of a majority of

§ 138. To say that the states have the power of legislating upon the same subject, and that their legislation will stand,

the court in *Houston v. Moore*, held that the Act of Congress which directed the offence to be tried by a *court-martial*, was necessarily exclusive. The following extract from his opinion will throw much light upon the subject: "In the remarks which have already been made, the answer to another proposition stated by the defendant is necessarily included. The offence to which the penalties are annexed in the 4th section of the Act of 1795, is not an offence against state authority, but against the United States, created by a law of Congress, in virtue of a constitutional authority, and punishable by a tribunal which it has selected, and which it can change at its pleasure.

"That tribunal is a court-martial; and the defendant contends, that as no explanatory terms are added, a state court-martial is necessarily intended, because the laws of the Union have not effectually created any court-martial, which, sitting under the authority of the United States, can in all cases try the offence. It will at once be seen that the Act of 1795 has not expressly delegated cognizance of the offence to the state court-martial, and the question naturally arises, in what manner, then, can it be claimed? When a military offence is created by an Act of Congress to be punished by a court-martial, how is such an act to be interpreted? If a similar clause were in a state law, we should be at no loss to give an immediate and definite construction to it, viz., that it pointed to a state court-martial. And why? Because the offence being created by state legislation, to be executed for state purposes, must be supposed to contemplate in its execution such tribunals as the state may erect, and control, and confer jurisdiction upon. A state legislature cannot be presumed to legislate as to foreign tribunals, but must be supposed to speak in reference to those which may be reached by its own sovereignty. Precisely the same reasons must apply to the construction of a law of the United States. The object of the law being to provide for the exercise of a power vested in Congress by the Constitution, whatever is directed to be done must be supposed to be done, unless the contrary be expressed, under the authority of the Union. When, then, a court-martial is spoken of in general terms in the Act of 1795, the reasonable interpretation is, that it is a court-martial to be organized under the authority of the United States—a court-martial whom Congress may convene and regulate. There is no pretence to say that Congress can compel a state court-martial to convene and sit in judgment on such offence. Such an authority is nowhere confided to it by the Constitution. Its power is limited to the few cases already specified, and these, most assuredly, do not embrace it; for it is not an implied power necessary or proper to carry into effect the given powers. The nation may orga-

unless repugnant to the legislation of Congress, seems to have no tendency to settle this question; for it is not the

nize its own tribunals for this purpose; and it has no necessity to resort to other tribunals to enforce its rights. If it do not choose to organize such tribunals, it is its own fault; but it is not, therefore, imperative upon a state tribunal to volunteer in its service. The 6th section of the same act comes in aid of this most reasonable construction. It declares that courts-martial for the trial of militia shall be composed of militia officers only, which plainly shows that it supposed that regular troops and officers were in the same service; and yet it is as plain that this provision would be superfluous, if state courts-martial were solely intended, since the state do not keep, and ordinarily have no authority to keep, regular troops, but are bound to confine themselves to militia. It might, with as much propriety, be contended that the courts-martial for the trial of militia under the 97th article of the rules and articles of war, are to be state courts-martial. The language of that article, so far as respects this point, is almost the same with the clause now under consideration.

“As to the argument itself, upon which the defendant erects his construction of this part of the act, its solidity is not admitted. It does not follow, because Congress have neglected to provide adequate means to enforce their laws that a resulting trust is reposed in the state tribunals to enforce them. If an offence be created of which no court of the United States has a vested cognizance, the state court may not, therefore, assume jurisdiction, and punish it. It cannot be pretended that the states have retained any power to enforce fines and penalties created by the laws of the United States in virtue of their general sovereignty; for that sovereignty did not originally attach on such subjects. They sprung from the Union, and had no previous existence. It would be a strange anomaly in our national jurisprudence to hold the doctrine, that because a new power, created by the Constitution of the United States, was not exercised to its full extent, therefore the states might exercise it by a sort of process in aid. For instance, because Congress decline ‘to borrow money on the credit of the United States,’ or ‘to constitute tribunals inferior to the Supreme Court,’ or ‘to make rules for the government and regulation of the land and naval forces,’ or exercise either of them defectively, that a state might step in, and by its legislation supply those defects, or assume a general jurisdiction on these subjects. If, therefore, it be conceded that Congress have not as yet legislated to the extent of organizing courts-martial for the trial of offences created by the Act of 1795, it is not conceded that therefore state courts-martial may, in virtue of state laws, exercise the authority, and punish offenders. Congress may hereafter supply such defects, and cure all inconveniences.

“It is a general principle, too, in the policy, if not the customary law

state law that is sought to be enforced, but the law of Congress. The states may perhaps constitutionally punish the

of nations, that no nation is bound to enforce the penal laws of another within its own dominions. The authority naturally belongs, and is confided, to the tribunals of the nation creating the offences. In a government formed like ours, where there is a division of sovereignty, and, of course, where there is a danger of collision from the near approach of powers to a conflict with each other, it would seem a peculiarly safe and salutary rule that each government should be left to enforce its own penal laws in its own tribunals. It has been expressly held by this court, that no part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated by Congress to state tribunals, and there is not the slightest inclination to retract that opinion. The judicial power of the Union clearly extends to all such cases. No concurrent power is retained by the states, because the subject-matter derives its existence from the Constitution; and the authority of Congress to delegate it cannot be implied, for it is not necessary or proper in any constitutional sense. But even if Congress could delegate it, it would still remain to be shown that it had so done. We have seen that this cannot be correctly deduced from the Act of 1795; and we are, therefore, driven to decide, whether a state can, without such delegation, constitutionally assume and exercise it.

"It is not, however, admitted, that the laws of the United States have not enabled courts-martial to be held under their own authority for the trial of these offences, at least when there are militia officers acting in service in conjunction with regular troops. The 97th article of war gives an authority for the trial of militia in many cases; and the Act of the 18th of April, 1814 (which has now expired), provided, as we have already seen, for cases where the militia was acting alone. To what extent these laws applied is not now necessary to be determined. The subject is introduced solely to prevent any conclusion that they are deemed to be wholly inapplicable. Upon the whole, I am of opinion, that the courts-martial intended by the Act of 1795, are not state courts-martial, but those of the United States; and this is the same construction which has been already put upon the same Act by the Supreme Court of Pennsylvania.

"What, then, is the state of the case before the court? Congress, by a law, declares that the officers and privates of the militia who shall, when called forth by the President, fail to obey his orders, shall be liable to certain penalties, to be adjudged by a court-martial convened under its own authority. The legislature of Pennsylvania inflict the same penalties for the same disobedience, and direct these penalties to be adjudged by a state court-martial called exclusively under its own

counterfeiting of the coin, or the robbery of the mail of the United States, by enactments which make them offences

authority. The offence is created by a law of the United States, and is solely against their authority, and made punishable in a specific manner; the legislature of Pennsylvania, without the assent of the United States, insist upon being an auxiliary, nay, as the defendant contends, a principal, if not a paramount sovereign in its execution. This is the real state of the case; and it is said, without the slightest disrespect for the legislature of Pennsylvania, who, in passing this Act, were, without question, governed by the highest motives of patriotism, public honor, and fidelity to the Union. If it has transcended its legitimate authority, it has committed an unintentional error, which it will be the first to repair, and the last to vindicate. Our duty compels us, however, to compare the legislation, and not the intention, with the standard of the Constitution.

“It has not been denied, that Congress may constitutionally delegate to its own courts exclusive jurisdiction over cases arising under its own laws. It is, too, a general principle in the construction of statutes, that where a penalty is prescribed to be recovered in a special manner in a special court, it excludes a recovery in any other mode or court. The language is deemed expressive of the sense of the legislature, that the jurisdiction shall be exclusive. In such a case, it is a violation of the statute for any other tribunal to assume jurisdiction. If, then, we strip the case before the court of all unnecessary appendages, it presents this point, that Congress had declared that its own courts-martial shall have exclusive jurisdiction of the offence; and the State of Pennsylvania claims a right to interfere with that exclusive jurisdiction, and to decide in its own courts upon the merits of every case of alleged delinquency. Can a more direct collision with the authority of the United States be imagined? It is an exercise of concurrent authority where the laws of Congress have constitutionally denied it. If an Act of Congress be the supreme law of the land, it cannot be made more binding by an affirmative re-enactment of the same act by a state legislature. The latter must be merely inoperative and void; for it seeks to give sanction to that which already possesses the highest sanction.

“What are the consequences, if the state legislation in the present case be constitutional? In the first place, if the trial in the state court-martial be on the merits and end in a condemnation or acquittal, one of two things must follow, either that the United States’ court-martial are thereby divested of their authority to try the same case, in violation of the jurisdiction confided to them by Congress, or that the delinquents are liable to be twice tried and punished for the same offence, against the manifest intent of the Act of Congress, the principles of the common law, and the genius of our free government. In the next place, it

against state laws ; and while such legislation is not repugnant to the legislation of Congress on the same subjects, it

is not perceived how the right of the President to pardon the offence can be effectually exerted ; for if the state legislature can, as the defendant contends, by its own enactment, make it a state offence, the pardoning power of the state can alone purge away such an offence. The President has no authority to interfere in such a case. In the next place, if the state can re-enact the same penalties, it may enact penalties substantially different for the same offence, to be adjudged in its own courts. If it possess a concurrent power of legislation, so as to make it a distinct state offence, what punishments it shall impose must depend upon its own discretion. In the exercise of that discretion, it is not liable to the control of the United States. It may exact more severe or more mild punishments than those declared by Congress. And thus an offence originally created by the laws of the United States, and growing out of their authority, may be visited with penalties utterly incompatible with the intent of the national legislature. It may be said that state legislation cannot be thus exercised, because its concurrent power must be in subordination to that of the United States. If this be true (it is believed to be so), then it must be upon the ground that the offence cannot be made a distinct state offence, but is exclusively created by the laws of the United States, and is to be tried and punished as Congress has directed, and not in any other manner or to any other extent. Yet the argument of the defendant's counsel might be here urged, that the state law was merely auxiliary to that of the United States ; and that it sought only to enforce a public duty more effectually by other penalties, in aid of those prescribed by Congress. The repugnancy of such a state law to the national authority would, nevertheless, be manifest, since it would seek to punish an offence created by Congress differently from the declared will of Congress. And the repugnancy is not, in my judgment, less manifest, where the state law undertakes to punish an offence by a state court-martial, which the law of the United States confines to the jurisdiction of a national court-martial.

“ The present case has been illustrated in the argument of the defendant's counsel, by a reference to cases in which state courts under state laws exercise a concurrent jurisdiction over offences created and punished by the laws of the United States. The only case of this description, which has been cited at the bar, is the forgery of notes of the Bank of the United States, which, by an Act of Congress, was punished by fine and imprisonment, and which, under state laws, has also been punished in some state courts, and particularly in Pennsylvania. In respect to this case, it is to be recollected, that there is an express proviso in the Act of Congress, that nothing in that Act should be construed to deprive the state courts of their jurisdiction under the

may stand. But, because a state court may thus lawfully take cognizance of an offence against a law of the state, it does not follow that it can enforce a law of the United States as such. The antecedent jurisdiction of the state over the same subject, or its power to try and punish offences against its own laws, has no tendency to show that it had an antecedent jurisdiction to try and punish offences against the laws of the United States.¹

state laws over the offences declared punishable by that act. There is no such proviso in the Act of 1793, and, therefore, there is no complete analogy to support the illustration.

“That there are cases in which an offence particularly aimed against the laws or authority of the United States may, at the same time, be directed against state authority also, and thus be within the legitimate reach of state legislation, in the absence of national legislation on the same subject, I pretend not to affirm, or to deny. It will be sufficient to meet such a case when it shall arise. But that an offence against the constitutional authority of the United States can, after the national legislature has provided for its trial and punishment, be cognizable in a state court, in virtue of a state law, creating a like offence and defining its punishment, without the consent of Congress, I am very far from being ready to admit. It seems to me, that such an exercise of state authority is completely open to the great objections which are presented in the case before us. Take the case of a capital offence, as, for instance, treason against the United States: can a state legislature vest its own courts with jurisdiction over such an offence, and punish it either capitally or otherwise? Can the national courts be ousted of their jurisdiction by a trial of the offender in a state court? Would an acquittal in a state court be a good bar upon an indictment for the offence in the national courts? Can the offenders, against the letter of the Constitution of the United States, ‘be subject for the same offence, to be twice put in jeopardy of life or limb?’ These are questions which, it seems to me, are exceedingly difficult to answer in the affirmative. The case, then, put by the defendant’s counsel clears away none of the embarrassments which surround their construction of the case at the bar of the court.

“Upon the whole, with whatever reluctance, I feel myself bound to declare, that the clauses of the militia act of Pennsylvania, now in question, are repugnant to the constitutional laws of Congress on the same subject, and are utterly void; and that, therefore, the judgment of the state court ought to be reversed. In this opinion I have the concurrence of one of my brethren.” 5 Wheaton, 47-76.

¹ See 1 Kent’s Com., Lec. XVIII., p. 404.

§ 139. This subject is one of no inconsiderable practical importance, for there are important rights which spring directly from the legislation of Congress, in regard to which an exclusive original jurisdiction has not always been vested, by express terms, in the courts of the United States, and where the question as to the existence of such an exclusive jurisdiction depends upon the implications to be derived from the nature and objects of the judicial power, as established by the Constitution. Take, for instance, the cases arising under the Patent and Copyright laws. The earlier patent acts did not, in express terms, confer an exclusive jurisdiction upon the courts of the United States.¹ The language of the more recent acts seems to create an exclusive jurisdiction, since they declare that "*all* actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to inventors, &c., shall be originally cognizable, as well in equity as at law, by the Circuit Courts of the United States," &c.² But this language is only a repetition of the term used in the Constitution, which declares that "all cases" arising under the laws of the United States shall belong to the judicial power. It may be said that the Constitution leaves to the discretion of Congress to employ an original jurisdiction or not, according to its discretion, and that, when it has created an original jurisdiction, and has declared that "all" cases arising under a particular law or class of laws shall be cognizable therein, the intention to make an exclusive jurisdiction is sufficiently manifested.

§ 140. But in respect to the copyright laws, there is this peculiarity: that while the Act of Feb. 15, 1819, declares that "the Circuit Courts of the United States shall have original cognizance, &c., of *all* actions, &c., arising under any law of the United States, granting or confirming to *authors* or inventors, the exclusive right to their respective writings, inven-

¹ Act of April 10, 1790, § 4; Act of Feb. 21, 1793, § 5.

² Act of Feb. 19, 1819; Act of July 4, 1836, § 17.

tions, and discoveries," &c., the subsequent Act of Feb. 3, 1831, directs the penalties and forfeitures, which it establishes, "to be recovered in any court having competent jurisdiction thereof." Whether this seeming discrepancy in legislative intention is to be removed, by a construction which will confine the latter expression of "courts of competent jurisdiction" to the courts designated by the former act, as those which are to exercise jurisdiction in *all* cases arising under the copyright laws, is the question presented by this legislation.

§ 141. But, however this may be, it cannot be doubted that when a right arises exclusively under a law of the United States, passed in pursuance of a power conferred by the Constitution, cognizance of all cases, of which the right thus created forms the basis of the controversy, belongs to the judicial power of the United States.¹ Cases of this description, besides those already mentioned, are those which arise under the clause in the act incorporating the Bank of the United States, which gave it a right to sue in the Circuit Courts; cases where the officers of the United States are authorized by Act of Congress to sue in their own names in the courts of the United States; and in general, cases where suits for penalties are authorized to be brought in the names of individuals in the courts of the United States.² In all these cases, where Congress have created an original jurisdiction in the federal tribunals, but have not in terms declared, as they might have done, that it is to be exclusive of the state courts, the question whether the state courts have a concurrent jurisdiction, depends primarily upon the consideration, whether they had jurisdiction originally over the subject-matter, and secondarily, upon the consideration, whether they can exercise jurisdiction consistently with the objects and purposes with which this class of cases have been placed within the judicial power of the United States, after Congress have extended that power to them in the form

¹ *Osborn v. The United States Bank*, 9 Wheat. 738.

² *Ibid.*

of original jurisdiction.¹ As to the first consideration, it is not easy to say, that the state courts had an antecedent jurisdiction in cases which spring directly from the legislation of Congress; and as to the second ground, although the requisition of the Constitution would be satisfied, by extending the appellate power to these cases, yet, when Congress have seen fit also to extend to them the original jurisdiction, the question is, whether that jurisdiction must not be held to extend to all the cases of the class, and thus, by implication, to exclude a concurrent jurisdiction of the state courts.²

¹ Mr. Chancellor Kent, after a short review of the cases of *Martin v. Hunter* and *Houston v. Moore*, lays down the position, that "the concurrent jurisdiction of the state courts depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the federal courts; and that, without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter." 1 Kent's Com., Lect. XVIII., p. 400.

² In *Cohens v. Virginia*, Mr. Ch. Justice Marshall seems to have given to the words "all cases," in the 3d Article of the Constitution, a force which makes original jurisdiction necessarily exclusive. In commenting on these words as applied to the original jurisdiction of the Supreme Court, he intimates that they make the jurisdiction of that court exclusive of all other courts. Now these words are applied to the whole judicial power, as well as to the original jurisdiction of the Supreme Court; and although it is left to Congress to distribute so much of the original jurisdiction as the Constitution has not itself vested, if the original jurisdiction which the Constitution has vested is made exclusive by these words, it would seem to follow that that part of the original jurisdiction which is left to be vested by Congress, must, by the same words, be made equally exclusive. The following is the passage referred to. "So too, in the same clause, the jurisdiction of the court is declared to be original, 'in cases affecting ambassadors, other public ministers, and consuls.' There is, perhaps, no part of the article under consideration so much required by national policy as this, unless it be that part which extends the judicial power 'to all cases arising under the Constitution, laws, and treaties of the United States.' It has been generally held, that the state courts have a concurrent jurisdiction with the federal courts, in cases to which the judicial power is extended, unless the jurisdiction of the federal courts be rendered exclusive by the words of the

§ 142. These views, it is supposed, are not inconsistent with the acknowledged jurisdiction of the state courts in those cases which arise under the Constitution and laws of the United States, by reason of a supposed conflict with the laws or constitution of a state. Where a case arises under the Constitution or laws of the United States, in this sense, that is, when it appears in the progress of a cause that they are involved in it, the courts of the United States can have jurisdiction only from that circumstance, and that circumstance cannot appear until after the suit has been instituted, and has made some progress. Such a case, therefore, can be reached only by the appellate power; there can be no original jurisdiction for it in the courts of the United States, since there is nothing in the aspect of the case before a suit has been instituted, to bring it within the judicial power. There is, therefore, a broad distinction between cases which arise under the Constitution and laws of the United States, because the latter are incidentally brought in question, and cases which arise directly under the Constitution and laws, by the assertion of a right as the foundation of the suit which springs immediately from them. The former cannot in general be reached by the original jurisdiction, the latter may always be reached by it.¹

third article. If the words 'to all cases,' give exclusive jurisdiction in cases affecting foreign ministers, they may also give exclusive jurisdiction, if such be the will of Congress, in cases arising under the Constitution, laws, and treaties of the United States. Now, suppose an individual were to sue a foreign minister in a state court, and that court were to maintain its jurisdiction, and render judgment against the minister, could it be contended that this court would be incapable of revising such judgment, because the Constitution had given it original jurisdiction in the case? If this could be maintained, then a clause inserted for the purpose of excluding the jurisdiction of all other courts than this, in a particular case, would have the effect of excluding the jurisdiction of this court in that very case, if the suit were to be brought in another court, and that court were to assert jurisdiction."

¹ *Cohens v. Virginia*, 6 Wheaton, 264, 394; see ante, § 121 note, the case of *Teal v. Felton*.

§ 143. As to all the residue of the cases belonging to the judicial power, the question whether there can be a concurrent jurisdiction in the state courts must depend upon the objects and purposes with which each case has been included in the federal jurisdiction; upon the language employed by the Constitution to create that jurisdiction, and to vest an original jurisdiction, where it has been vested; and upon the existence of an antecedent state jurisdiction in the same class of cases. The cases which fall under this general head are those, which have been supposed to have been included within the judicial power on account of the character of the parties.¹ They are “controversies to which the United States shall be a party,—controversies between two or more states,—between a state and the citizens of another state,—between citizens of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.”

§ 144. Of these, there is only one class of cases in respect to which the Constitution employs language from which an exclusive jurisdiction is to be inferred, and that is found in the clause distributing the original and appellate jurisdiction of the Supreme Court. It declares that “in *all* cases affecting ambassadors, other public ministers, and consuls, *and those in which a state shall be a party*, the Supreme Court shall have original jurisdiction.” It is quite certain that the cases here referred to as those to which a state is a party, are those where jurisdiction was given, because the state is

¹ I have classed the cases “affecting ambassadors,” &c., in that branch of the jurisdiction which depends upon the subject-matter; and they belong to this branch, because it is quite clear that it is not necessary that the foreign minister should be a party to the record, in order to bring the case within the judicial power of the United States. If the suit is brought against a foreign minister, the Supreme Court of the United States alone has original jurisdiction, by the terms of the Constitution, and this is shown on the record. But if the suit, though not brought against the minister, “affects” him, it is within the judicial power, and it is placed there on account of this feature in the subject-matter. See *Osborn v. The Bank of the United States*, 9 Wheaton, 738, 854.

a party to the record, and not those where the jurisdiction may attach on account of the character of the subject-matter, whether a state be or be not a party. If a state be a party, and the suit is brought without reference to any of the other grounds of jurisdiction peculiar to the judicial power of the United States, then the case comes within the judicial power as a case to which the state is a party, and it must be brought in the Supreme Court of the United States. But, on the other hand, a case to which a state is a party may have originated in a state court, and may come within the appellate jurisdiction of the Supreme Court of the United States, by reason of the subject-matter, which may involve the construction or operation of the Constitution or laws of the United States. The nature of the subject-matter, however, does not appear until after the suit has been instituted; and it is apparent, therefore, that there may be a case to which a state may be a party, and yet it may belong to the appellate and not to the original jurisdiction of the Supreme Court, by reason of the fact that the subject-matter determines the jurisdiction, and not the character of the party.¹

§ 145. This distinction shows, therefore, that when the Constitution assigns to the original jurisdiction of the Supreme Court all cases to which "a state shall be a party," it means all cases to which the jurisdiction of the courts of the United States attaches, *because* the state is a party. It is obvious, therefore, that all suits brought against a state may be brought originally in the Supreme Court of the United States, and that as the Constitution originally stood, it was in the power of Congress to have made the jurisdiction exclusive, as it did by the Judiciary Act of 1789, § 13, as to all controversies of a civil nature, where a state is a party, except between a state and its citizens, and except, also, between a state and citizens of other states, or aliens; in which latter case it was to have original, but not exclusive

¹ See the opinion of the court in *Cohens v. Virginia*, 6 Wheaton, 264, 392.

jurisdiction. But subsequently to the passage of the Judiciary Act, the eleventh amendment of the Constitution took from the judicial power of the United States all cognizance of suits brought against a state by citizens of other states in the Union, or by the citizens or subjects of foreign states. There remain, therefore, of the cases to which a state can be a party as defendant in the courts of the Union only those between two or more states,¹ between a state and a foreign state,² and those between a state and its own citizens. Practically, however, the two first are the only cases that can arise, since the states do not generally allow of suits being brought against them by their own citizens;³ and as to these, the jurisdiction of the Supreme Court is made by the Judiciary Act exclusive. Where a state is plaintiff, and the citizens of other states, or aliens, are defendants, the Supreme Court has original, but not exclusive jurisdiction.

§ 146. As to the controversies to which the United States shall be a party, those between citizens of the different states, or between the citizens of a state and aliens or foreign states, it appears to have been the purpose of the Constitution to provide a tribunal, to which resort might be had, which would be more likely to be impartial, than the state courts might always be, under the same circumstances: but to leave the resort to that tribunal entirely optional. That the jurisdiction was not intended to be exclusive is apparent, from the fact, that the state courts may have had an antecedent jurisdiction in these cases, which are characterized only by a description of the parties, without reference to the subject-matter, and that the Constitution employs no language with reference to them, which might import a surrender of that antecedent jurisdiction. Accordingly, the Judiciary Act has

¹ *The State of New Jersey v. The State of New York*, 5 Peters, 283; *Rhode Island v. Massachusetts*, 12 Peters, 657.

² *The Cherokee Nation v. The State of Georgia*, 5 Peters, 1.

³ This exception does not extend to a writ of error prosecuted to the Supreme Court of the United States by an individual against a state. *Cohens v. Virginia*, *ante*.

made the jurisdiction of the courts of the United States concurrent only, in these cases, with that of the state courts.¹

§ 147. There remains only the class of cases described by the Constitution as “controversies between citizens of the same state claiming lands under grants of different states.” It is not easy to make a strict classification of these cases, under the one or the other general head of jurisdiction. The character of the parties is not alone regarded, nor is the character of the subject-matter the sole ground of jurisdiction. Both seem to have been taken into view. On the one hand, the character of the parties is expressly designated; but as this is the only case where jurisdiction has been expressly conferred between citizens of the same state, and as the same reasons for a national jurisdiction do not generally exist between citizens of the same state as between citizens of different states, a peculiar reason for the jurisdiction in this particular case must be sought for. That reason is to be found in the subject-matter, which is a comparison of titles claimed to be derived from the grants of different states. The Constitution intended to secure an impartial tribunal for the decision of these causes, and it supposed that a state tribunal might not stand indifferent in a controversy where the claims of its own sovereign were in conflict with those of another sovereign.² But the Constitution employs no terms with reference to this class of cases, which evince an intention to make the jurisdiction exclusive; and from the very nature of the cases, it would be impracticable to establish any exclusive original jurisdiction in the courts of the United States, so as to compel parties in all instances to originate their cases in those courts, for the reason that the title claimed by the defendant may not appear until after a suit has been instituted. Accordingly, what the Judiciary Act has done, is, to give either party a right to have the case removed into a circuit court, when it has been commenced in a state court,

¹ Act of 1789, § 9, 11.

² *Town of Pawlet v. Clarke*, 9 Cranch, 292, 322.

and it appears that the parties respectively claim lands of the value of more than five hundred dollars, under the grants of different states.¹

§ 148. Connected with this subject of the original jurisdiction of the courts of the United States, and their relation to the state courts, we have again to notice the power of removal, which, as we have just seen, is sometimes exerted, where the nature of the subject-matter cannot appear until after a suit has been instituted, but where the subject-matter is in fact such as to bring the case within the judicial power of the United States, and it is proper that that power should act by way of original jurisdiction. This power of removal is also exerted in some cases where the jurisdiction depends on the characters of the parties, and where the plaintiff has seen fit to institute the proceeding in a state court. The existence of this power, under the Constitution, is clearly to be inferred from the nature, objects, and extent of the judicial power of the United States. The Constitution has declared that the judicial power shall extend to certain cases described, and has left it to Congress to provide that it shall reach them by the exercise of original or appellate jurisdiction, or both, excepting in the few cases where it has vested original jurisdiction in the Supreme Court. Congress may therefore employ the original jurisdiction in such manner as will most effectually answer and completely fulfil the purposes of the Constitution. It may employ it in such a manner as to compel all cases of a certain class to be instituted in the courts of the United States alone, where it is practicable to do so, and may provide that another class of cases may be transferred to them, when they originate elsewhere, and be prosecuted as if they had been commenced in the first instance in the national tribunals. In either form of exercising the original jurisdiction, Congress is employing only the judicial power which the Constitution has created. Indeed, without the power of removal, the judicial power

¹ Act of 1789, § 12.

would be deprived of many of the objects to which the Constitution has expressly extended it. Not only may cases be commenced in the state courts, where the parties are such as the Constitution describes, but other cases, where the subject-matter is such as the Constitution intended to include within the judicial power, may also be instituted in the state tribunals. All these cases are within the judicial power, as well after they have been instituted, as before; but the facts which bring them within the definitions of the Constitution, may not appear until after the suit has been commenced. It may be laid down, therefore, as a general proposition, that wherever there is a case cognizable in the courts of the United States, of which the state courts have concurrent jurisdiction, it is competent to Congress to provide for its removal from a state court to a court of the United States, to be proceeded in as if it had originated in the latter jurisdiction.

§ 149. But this power of removal has been extended only to three classes of cases: 1. Those involving a title to land of more than \$500 value, where both parties are citizens of the same state, and claim under the grants of different states;¹ 2. Those where the plaintiff is a citizen of one state and the defendant is a citizen of another state, or an alien;² 3. Those where any officer of the United States, or other person, is sued in a state court for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title, set up or claimed by such officer or other person, under any such law of the United States.³ The mode in which such removals are to be effected, will be a proper subject of consideration, in treating of the jurisdiction of the circuit and district courts.

¹ Act of 1789, § 12.

² *Ibid.*

³ Act of March 3, 1833, § 3.

BOOK II.

THE JURISDICTION AND PRACTICE OF THE SUPREME COURT OF THE UNITED STATES.

CHAPTER I.

THE ORIGINAL JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

§ 150. WE have seen that the Constitution conferred upon the Supreme Court of the United States original jurisdiction in "all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party." We have also seen that the better opinion is, that this original jurisdiction, given on account of the character of the party, is exclusively vested in the Supreme Court by the Constitution;¹ that it is not exclusive of its appellate jurisdiction, on account of the character of the party, if an inferior court of the United States had jurisdiction on account of the character of the cause;² and that it is confined to the cases enumerated in the Constitution, and cannot be enlarged by Congress.³

§ 151. The Judiciary Act, passed on the 24th September, 1789, declared that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original, but not

¹ Ante.

² Ante.

³ Ante.

exclusive jurisdiction; and shall have, exclusively, all such jurisdiction of suits or proceedings against ambassadors, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul shall be a party. And the trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury."¹

§ 152. Subsequently to the passage of this act, the *eleventh* article of the amendments to the Constitution (proposed in 1794, and adopted in 1798), took from the judicial power of the United States cognizance of all suits in law or equity commenced or prosecuted *against* a state by citizens of another state, or by citizens or subjects of a foreign state. Striking out therefore from the scope of the Judiciary Act, as subjects of the original jurisdiction of the Supreme Court, all suits against a state by citizens of another state, or citizens or subjects of a foreign state, the subjects of its original jurisdiction remain the following: suits in which a state is plaintiff and individuals are defendants; suits in which a state is plaintiff and another state is defendant; suits in which a foreign state is plaintiff and one of the United States is defendant; and suits in which ambassadors, other public ministers, and consuls, are parties, either as plaintiffs or defendants. The statute makes the jurisdiction exclusive where both parties are states. Where the citizens of another state, or aliens, are defendants, and a state is plaintiff, the jurisdiction is not exclusive. But in all these cases there is an original jurisdiction in the Supreme Court. The statute also makes the original jurisdiction exclusive where ambassadors, or other public ministers, or their domestics, or domestic servants, can be proceeded against, as defendants, in a court of law, consistently with the law of nations; but

¹ Sec. 13.

where ambassadors, or other public ministers, are plaintiffs, or where a consul or vice-consul is either plaintiff or defendant, the original jurisdiction is not made exclusive.

§ 153. We are now to examine the original jurisdiction of the Supreme Court with reference to each of these cases; and first, with regard to those where a state is a party. This class of cases subdivides itself into three; those where one state is plaintiff, and another state is defendant; those where a state is plaintiff, and an individual, whether a citizen of some other state, or an alien, is defendant; and those where a foreign state is plaintiff against one of the United States as defendant. These are the only cases, within the judicial power of the United States, to which a state can be a party.

§ 154. In the cases where both parties are states, the original jurisdiction of the Supreme Court being exclusive, it embraces all controversies capable, from their nature, of being submitted to the action of the judicial power.¹ Although the Constitution does not, in terms, extend the judicial power to *all* controversies between two or more states, yet it in terms excludes none, whatever be their nature or subject. The question of boundary between two states, is a judicial question, and belongs to the original jurisdiction of the Supreme Court.² The question is one of equitable jurisdiction, and the proceeding has always been by bill.³ The court has power to regulate the service of process, and the course of proceeding, although no Act of Congress has expressly pre-

¹ I have not undertaken to set forth the reasons and motives upon which any branch of the jurisdiction of the courts of the United States was conferred, because they have been elaborately displayed by Mr. Justice Story in his Commentaries on the Constitution, and I could add nothing to that luminous and admirable exposition.

² *Rhode Island v. Massachusetts*, 12 Peters, 657; *New Jersey v. New York*, 5 Peters, 283.

³ *Ibid.* *New York v. Connecticut*, 4 Dall. 1.

scribed them.¹ If a state neglects or refuses to appear upon due service of process, no coercive measures are taken by the court to compel an appearance, but the plaintiff state is allowed to proceed *ex parte*.²

§ 155. The next case, of a suit by a state against an individual, has occurred in the original jurisdiction of the Supreme Court. The State of Pennsylvania brought a bill against "The Wheeling and Belmont Bridge Company," a corporation created by Act of the Legislature of Virginia, for the construction of a bridge across the river Ohio, at Wheeling, and certain persons engaged in constructing it. One of the principal questions involved in this case was, whether the State of Pennsylvania had such a direct interest in the unobstructed navigation of the river, as to sustain an application to the court, in the exercise of its original jurisdiction, for an injunction. The alleged interest consisted in the injury to the revenues of the public works of the state, caused by the obstruction of navigation; and this was held to be sufficient.³ The jurisdiction in such a case as this is not made exclusive, for the obvious reason that a state might choose to sue in its own courts, if service could be made.

¹ New Jersey *v.* New York.

² Rhode Island *v.* Massachusetts.

³ The State of Pennsylvania *v.* The Wheeling and Belmont Bridge Company and Others, 13 Howard, 518. In the opinion of the court, as reported, it is stated that the bill in this case was filed in the office of the Supreme Court in July, 1849 (13 Howard, 557). It appears from the report in 9 Howard, 647, that an application was made in August, 1849, to Mr. Justice Grier, sitting in the Circuit Court at Philadelphia, for an injunction, which was adjourned by him into the Supreme Court, where an order was made to a commissioner to take testimony. At the December Term, 1850, the cause was assigned for a final hearing at the next term (11 Howard, 528), and the report in 13 Howard is the final hearing. This case, and that of Rhode Island *v.* Massachusetts, 12 Peters, 657, show that in cases within the original jurisdiction of the Supreme Court, the bill should be filed in that court. A subpoena will be issued, according to the practice of the court, which is regulated by Rule 10. See *infra*, note.

The case of a suit by a citizen against his own state may exist, where the state has authorized itself to be sued, but it is doubtful whether it is within the judicial power of the United States.¹

§ 156. The case of a foreign state as plaintiff against one of the United States as defendant, belongs also to the original and exclusive jurisdiction of the Supreme Court. It seems, that it may embrace any controversy on which the judicial power is capable of acting. But where a bill in equity sought to restrain a state from the forcible exercise of legislative power over a neighboring people, asserting their independence, the state denying their right to it, the Supreme Court intimated a very strong doubt whether it could interpose, although it might have jurisdiction to settle the question of title, relative to the lands in the occupation of such people. The case, however, was decided upon another ground, which presented the question whether the Indian tribes or nations, within the United States, are "foreign states" within the meaning of the clause in the Constitution which declares the extent of the judicial power. It was a bill filed by the Cherokee nation against the State of Georgia, to restrain that state from executing and enforcing any of its laws within the Cherokee territory, as designated by treaty between the United States and the Cherokee nation. The court held that it had been made satisfactorily to appear that the Cherokees were a distinct political society, separated from others, capable of managing its own affairs and governing itself; but that this, in the case of the Indian nations, whose relation to the United States is marked by peculiar distinctions which exist nowhere else, did not make them a "foreign state," in the sense of the Constitution.²

¹ See the remarks of Mr. Justice Story on the subject of suits against a state by individuals: Commentaries on the Constitution, § 1671-1672.

² The Cherokee Nation v. The State of Georgia, 5 Peters, 1. In this case, Mr. Chief Justice Marshall, delivering the opinion of the court, said: "So much of the argument as was intended to prove the charac-

§ 157. The question whether the original jurisdiction of the Supreme Court, in cases to which a state is a party, may

ter of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs, and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognise them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognise the Cherokee nation as a state, and the courts are bound by those acts.

"A question of much more difficulty remains. Do the Cherokees constitute a foreign state in the sense of the Constitution?

"The counsel have shown conclusively that they are not a state of the Union, and have insisted individually that they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state. Each individual being foreign, the whole must be foreign.

"This argument is imposing, but we must examine it more closely before we yield to it. The condition of the Indians, in relation to the United States, is, perhaps, unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term *foreign nation* is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions, which exist nowhere else.

"The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees in particular were allowed by the treaty of Hopewell, which preceded the Constitution, 'to send a deputy of their choice, whenever they think fit, to Congress.' Treaties were made with some tribes by the State of New York, under a then unsettled construction of the Confede-

include a suit by an alien in the admiralty *in rem*, making a state the claimant, notwithstanding the 11th article of the amendments to the Constitution, has never been decided;

ration, by which they ceded all their lands to that state, taking back a limited grant to themselves, in which they admit their dependence.

"Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the land they occupy, until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States, can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

"They look to our government for protection, rely upon its kindness and its power, appeal to it for relief to their wants, and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.

"These considerations go far to support the opinion, that the framers of our Constitution had not the Indian tribes in view when they opened the courts of the Union to controversies between a state or the citizens thereof, and foreign states.

"In considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbors, ought not to be entirely disregarded. At the time the Constitution was framed, the idea of appealing to an American court of justice for an assertion of right, or a redress of wrong, had, perhaps, never entered the mind of an Indian or his tribe. Their appeal was to the tomahawk or to the government. This was well understood by the statesmen who framed the Constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the Union. Be this as it may, the peculiar relations between the United States and the Indians occupying our territory are such, that we should feel much difficulty in considering them as designated by the term *foreign state*, were there no other part of the Constitution which might shed light on the meaning of these words. But, we think, that in construing them, considerable aid is furnished by that clause in the eighth section of the third article, which empowers Congress to 'regulate

but in a case where a libel was filed in the Supreme Court, by an alien, against the State of Georgia, alleging that the

commerce with foreign nations, and among the several states, and with the Indian tribes.'

"In this clause they are as clearly contradistinguished by a name appropriate to themselves from foreign nations, as from the several states composing the Union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects to which the power of regulating commerce might be directed, are divided into three distinct classes, foreign nations, the several states, the Indian tribes. When forming this article, the Convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption.

"The counsel for the plaintiffs contend that the words 'Indian tribes' were introduced into the article empowering Congress to regulate commerce, for the purpose of removing those doubts in which the management of Indian affairs was involved by the ninth article of the Confederation. Intending to give the whole power of managing those affairs to the government about to be instituted, the Convention conferred it explicitly, and omitted those qualifications which embarrassed the exercise of it as granted in the Confederation. This may be admitted without weakening the construction which has been intimated. Had the Indian tribes been foreign nations, in the view of the Convention, this exclusive power of regulating intercourse with them might have been, and most probably would have been, specifically given in language indicating that idea, not in language contradistinguishing them from foreign nations. Congress might have been empowered 'to regulate commerce with foreign nations, including the Indian tribes, and among the several states.' This language would have suggested itself to statesmen, who considered the Indian tribes as foreign nations, and were yet desirous of mentioning them particularly.

"It has been also said, that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument; their meaning is controlled by the context. This is undoubtedly true. In common language, the same word has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context. This may not be equally true with respect to proper names. *Foreign nations* is a general term, the application of which to Indian tribes, when used in the American Constitution, is at best extremely questionable. In one article in which a power is

state was in possession of the proceeds of certain property of the alien's, illegally seized and sold, and praying admiralty process to compel restitution, the court said, that it was not a case where the property is in custody of a court of admiralty, or brought within its jurisdiction, and in the possession of a private person, and therefore did not belong to the admiralty jurisdiction. It was a mere personal suit against a state to recover proceeds in its possession, and an alien individual cannot commence such a suit against a state.¹

§ 158. The original jurisdiction of the Supreme Court is exclusive under the Judiciary Act in all cases where ambassadors, or other public ministers, or their domestics, or domestic servants, are sought to be made defendants. It is concurrent with the other courts of the United States, and with the state courts, where ambassadors, or other public ministers, their domestics or domestic servants, and consuls, are

given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate, in terms clearly contradistinguishing them from each other. We perceive plainly that the Constitution, in this article, does not comprehend Indian tribes in the general term 'foreign nations;' not, we presume, because a tribe may not be a nation, but because it is not foreign to the United States. When, afterwards, the term 'foreign state' is introduced, we cannot impute to the Convention the intention to desert its former meaning, and to comprehend Indian tribes within it, unless the context force that construction upon us. We find nothing in the context, and nothing in the subject of the article, which leads to it.

"The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe, or nation, within the United States, is not a foreign state in the sense of the Constitution, and cannot maintain an action in the courts of the United States."

¹ Ex parte Juan Madrazo, 7 Peters, 627. As the words of the amendment only prohibit suits "*in law or in equity*" from being brought against a state by citizens of another state or aliens, there can be little doubt that the Supreme Court of the United States, in a case of admiralty jurisdiction, would sustain, as a branch of its original jurisdiction, a suit by an alien against a state.

plaintiffs. The only remaining case, of this class, is that of a suit brought against a consul, or vice-consul; and with regard to this, although it is clear that the state courts cannot take jurisdiction, if the defendant asserts his privilege,¹ and although the Judiciary Act has conferred jurisdiction on the district courts of the United States, it is not well settled that this jurisdiction is consistent with the provisions of the Constitution, or, in other words, that the Judiciary Act should not have made the original jurisdiction of the Supreme Court exclusive, in suits against consuls, as well as ambassadors and ministers.

§ 159. It is to be observed, that the Constitution gives original jurisdiction to the Supreme Court in "all cases affecting ambassadors, other public ministers, and consuls." The motives on which the judicial power of the United States was made to extend to these cases, are quite apparent. They involve the relations of the national government with foreign powers. When, therefore, the Constitution proceeds to distribute the judicial power, and to assign original cognizance of all these cases to the Supreme Court, the question arises, whether the same solicitude respecting our peace with foreign powers did not induce the provision by which original jurisdiction is given to the Supreme Court.² If it did, it ought to appear, from some countervailing reason, that although the Constitution gives to the Supreme Court original jurisdiction in a class of cases which it was manifestly solicitous to preserve to the judicial power of the United States upon great reasons of national policy, it still intended to leave original cognizance of those cases to be conferred by Congress upon the inferior courts of the United States also. Now, although it is a maxim of constitutional law, that "original jurisdiction, so far as the Constitution gives a rule, is co-extensive with the judicial power,"³ and conse-

¹ *Davis v. Packard*, 7 Peters, 276, 280.

² *Marbury v. Madison*, 1 Cranch, 137; *Cohens v. Virginia*, 6 Wheat. 396, 397.

³ *Osborn v. U. S. Bank*, 9 Wheat. 820.

quently that where the Constitution has omitted to vest original jurisdiction, it may be vested by Congress, yet it would seem to follow, that in cases where the Constitution itself has vested original jurisdiction in the Supreme Court, that investiture must operate as an exception to the general authority to Congress to vest original jurisdiction according to its discretion.

§ 160. The Supreme Court of the United States have intimated that such is the effect of the grant of original jurisdiction to that tribunal. On one occasion, they said, "with the exception of these cases, in which original jurisdiction is given to this court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the Constitution."¹ More recently, they intimated a very distinct doubt whether the jurisdiction of the Supreme Court in these cases is not both original and exclusive.²

§ 161. The Judiciary Act, however, manifestly proceeds upon the supposition that the jurisdiction of the Supreme Court in these cases is not exclusive. It makes the jurisdiction exclusive in all cases brought against ambassadors and ministers; but in cases brought by ambassadors and ministers, or by or against a consul or vice-consul, it declares that it shall not be exclusive;³ and it confers upon the district courts of the United States, exclusively of the state courts, jurisdiction "of all suits against consuls, or vice-

¹ *Osborn v. U. S. Bank*, 9 Wheat. 738, 820.

² *U. States v. Ortega*, 11 Wheat. 467; see also Mr. Wheaton's elaborate note to that case. The point had been decided the other way in *United States v. Ravara*, 2 Dall. 297; see also *Chisholm v. Georgia*, 2 Dall. 419, 431, 436. Mr. Justice Story (Commentaries, § 1699) has stated the uncertainty in which the question is left, but does not intimate his opinion. Mr. Chancellor Kent (1 Com., Sect. XV., p. 315) does the same.

³ Act 24 Sept., 1789, § 13.

consuls," except for certain offences specified.¹ This includes civil and criminal cases both.

§ 162. The limitation introduced by the Judiciary Act upon the exclusive jurisdiction of the Supreme Court in suits or proceedings against ambassadors and ministers, or their domestics, confining it to such jurisdiction, "as a court of law can have or exercise consistently with the law of nations," has never received any judicial construction by that court. For the effect of this limitation, resort must be had to the law of nations. The leading principle of that law is, that the person of a public minister is sacred and inviolable, not only because he represents his sovereign, but because the objects of his mission cannot be accomplished, without such immunity. Whoever offers any violence to a public minister, not only injures the sovereign whom he represents, but also hurts the common safety and well-being of nations, and commits an offence against the public law. By the universal practice of nations, also, a foreign minister is entirely independent of the jurisdiction and authority of the state in which he resides; and this general exception applies both to the civil and criminal jurisdiction of the courts of the country.²

§ 163. How far, and by what acts, a foreign minister may forfeit the privileges which attach to his office, has been a mooted point. Whether he can, in any case, make himself amenable to the ordinary criminal jurisdiction of the courts of law, is a question admitting of great doubt.³ That he is

¹ Sect. 9.

² Vattel, Law of Nations, Book 4, ch. 7, § 92; 2 Ward's Hist. of the Law of Nations, 486-552; 1 Kent's Com., Lect. 2, p. 39; *Schooner Exchange v. McFadden*, 7 Cranch, 116.

³ In the case of *The Schooner Exchange v. McFadden*, 7 Cranch, 116, Marshall, C. J., delivering the opinion of the court, said, "Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides;

not so amenable, by the law of nations, while his ambassadorial character continues, whatever the nature of his offence, or however flagrant his conduct, is very generally agreed by the publicists; and it is not intimated that he loses or forfeits the privileges of his ambassadorial character by his offences. The sole remedy, in cases of ordinary crime, or even in serious offences against the state, is to solicit his recall, or to arrest and send him home for trial or punishment by his own sovereign. If his conduct goes to the extent of making war upon the government of the country, or he becomes dan-

still, the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

"This consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

"The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction, which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

"In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them."

gerous to the public safety, he may be put to death as an enemy, upon the rules of self-defence; for, in becoming an enemy, and in obliging the government to resort to the rights of self-defence, he lays aside the sanctity of his ambassadorial character. But if the case admits of delay for the purposes of trial and inquiry, and does not require the instant application of the law of self-preservation, it would seem that he does not forfeit the privileges of his official character, and must be tried and punished by his own sovereign.¹

§ 164. However it may be with regard to criminal jurisdiction, all the authorities are agreed that a foreign minister is not amenable to the civil jurisdiction of the courts, according to the law of nations.² Whether this exemption includes only privilege from arrest and seizure of goods, or extends also to an absolute immunity from suits and prosecutions of every kind, so that he cannot be summoned into a court of law, may admit of doubt. Our statute law has made void all process of arrest or attachment against foreign ministers, or their servants, and punishes the suing out or executing of such process.³

¹ Vattel, Book 4, ch. 7, § 94, *et seq.*; Ward, *ut. supr.*; Grotius, B. 2, c. 18, § 1-6; Kent, *ut. supr.* The common law of England has been laid down by great writers to be otherwise, and it has been said that although an ambassador cannot commit *high treason*, not owing allegiance to the sovereign to whom he is accredited, yet that for crimes against society he may be tried and punished by the courts of the country: Foster's Cr. Law, 188; Hale's Pl. Cr., I. 99; Blackstone. But this is contrary to the law of nations, which admits only one exception to the sanctity of a minister's person, and that is, where his proceedings justify his being treated instantly as an enemy by the executive power, and arrested and sent out of the country, or put to death, upon the great rules of self-defence. Mr. Ward has given a very learned discussion of the whole subject in the passages above cited, where he states that the exemption of the *suite* of a minister is not so generally decided. The provision in our Judiciary Act fully adopts the law of nations on this whole subject, and was probably designed to exclude what may have been supposed to be the doctrines of the common law of England.

² See the text-writers above cited.

³ Crimes Act of 1790, c. 36, § 25, 26, 27.

§ 164 a. Whether it is to be presumed, however, from this provision, and from that of the Judiciary Act, that suits may be commenced and prosecuted without arrest of the person, or seizure of goods, depends entirely upon the provisions of the law of nations. The Judiciary Act gives to the Supreme Court such jurisdiction only as is consistent with that system of law, which must be examined, for a solution of this question.¹

§ 165. Consuls are not included within the privileges which attach to ministers, by the law of nations;² and, consequently, the Judiciary Act does not save for them the benefits of that law. It gives to the Supreme Court original, but not exclusive jurisdiction, in all cases in which they may be either plaintiffs or defendants, and vests (whether rightfully or not, we have seen, admits of a doubt) criminal as well as civil jurisdiction against them, in the district courts.³

§ 166. The Supreme Court, and all the other courts of the United States, have power, under the Judiciary Act, to issue "writs of scire facias, habeas corpus, and all other writs which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and

¹ Mr. Wheaton, in a learned note on this subject, in the *eleventh* volume of his Reports, p. 469-475, sums up the jurisdiction in cases of ambassadors, &c., and among the exceptions created by our statute provisions, states, "that an ambassador, or other public minister, cannot be proceeded against, in any civil case, *by compulsory process*, in any court whatever." He referred here, evidently, to the prohibition against arrest. All process is, in one sense, compulsory, and if the minister, against whom a suit is commenced by summons only, does not choose to appear, the question will arise whether the suit can be prosecuted. In this view, perhaps the Judiciary Act intended to confer jurisdiction only where the appearance is voluntary; and, perhaps, this will be found to be all that is consistent with the law of nations.

² *Vivian v. Beeker*, 3 Maule & Selw. 284; Mr. Wheaton's note *ut supr.*

³ *Ante.*

usages of law.”¹ But this does not enlarge the original jurisdiction of the courts, which remains fixed by the Constitution; and, accordingly, the original jurisdiction of the court does not extend to the case of a petition by a private individual for a *habeas corpus*, to bring up the body of his infant child, alleged to be unlawfully detained from him.²

¹ Sect. 14.

² Ex parte Barry, 2 Howard, 65. As to the appellate jurisdiction exercised by means of these writs, see *post*.

CHAPTER II.

THE APPELLATE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, WITH REFERENCE TO THE CIRCUIT COURTS.

§ 167. THE Constitution has conferred upon the Supreme Court appellate jurisdiction in all the cases belonging to the judicial power of the United States, other than those of which it has original jurisdiction, with such exceptions and under such regulations as Congress may make. Our inquiry will now be, therefore, what is included in the appellate jurisdiction of the Supreme Court, and in what mode is it to be exercised.

§ 168. The restriction imposed by the Constitution upon the appellate jurisdiction of the Supreme Court, arises from the authority given to Congress to regulate it, and to except cases from its operation. This authority was exercised at the time of the establishment of the judicial system, and the provisions then and since made have received repeated construction, in a long series of decisions. The appellate jurisdiction thus regulated divides itself into two great branches, one embracing writs of error and appeals from the Circuit Courts of the United States, and the other including writs of error to the courts of the states.

§ 169. The Judiciary Act provides that final judgments and decrees in civil actions (and suits in equity) in a Circuit Court, brought there by original process, or removed there from the courts of the several states, or removed there by appeal from a District Court, where the matter in dispute exceeds

the sum or value of two thousand dollars, may be re-examined and reversed or affirmed in the Supreme Court, upon a writ of error, brought within five years after rendering or passing the judgment or decree complained of; but errors in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, and errors in fact, are not re-examinable.¹ A subsequent statute has provided another mode, by which questions may be carried to the Supreme Court, by a division of opinion between the judges of the Circuit Court.²

¹ Act of 24th September, 1789, § 22. The whole section is as follows: "And be it further enacted, That final decrees and judgments in civil actions in a district court where the matter in dispute exceeds the sum or value of fifty dollars exclusive of costs, may be re-examined and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, and assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such district court, or a justice of the Supreme Court, the adverse party having at least twenty days' notice. And upon a like process may final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several states, or removed there by appeal from a district court, where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined, and reversed, or affirmed in the Supreme Court, the citation being in such case signed by a judge of such circuit court, or justice of the Supreme Court, and the adverse party having at least thirty days' notice. But there shall be no reversal in either court on such writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact. And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be an infant, *feme covert*, *non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability. And every justice, or judge, signing a citation on any writ of error as aforesaid, shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fail to make his plea good."

² Act of 29th April, 1802, § 6.

§ 170. A still more recent act provides for appeals to the Supreme Court from all final judgments or decrees rendered in any circuit court, or in any district court acting as a circuit court, in any cases of equity, of admiralty, and of maritime jurisdiction, and of prize or no prize, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars.¹ This statute repeals so much of the 22d section of the Judiciary Act as provides for carrying up cases in equity or admiralty, by writs of error.

§ 171. First, then, with regard to the exercise of the appellate jurisdiction by writ of error to a circuit court. The first requisite is, that the matter in dispute should exceed the sum or value of two thousand dollars, exclusive of costs.²

¹ Act of March 3d, 1803, § 2. That, from all final judgments or decrees in any of the district courts of the United States, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed to the circuit court next to be holden in the district where such final judgment or judgments, decree or decrees, may be rendered; and the circuit court or courts are hereby authorized and required to receive, hear, and determine, such appeal; and that from all final judgments or decrees rendered, or to be rendered, in any circuit court or in any district court acting as a circuit court, in any case of equity, of admiralty and maritime jurisdiction, and of prize or no prize, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of two thousand dollars, shall be allowed to the Supreme Court of the United States; and that, upon such appeal, a transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause, shall be transmitted to the said Supreme Court; and that no new evidence shall be received in the said court, on the hearing of such appeal, except in admiralty and prize causes, and that such appeals shall be subject to the same rules, regulations, and restrictions, as are prescribed in law in case of writs of error; and that the said Supreme Court shall be, and hereby is, authorized and required to receive, hear, and determine such appeals. And that so much of the nineteenth and twenty-second sections of the Act of Congress, entitled "An Act to establish the judicial courts of the United States," passed on the twenty-fourth day of September, seventeen hundred and eighty-nine, as comes within the purview of this act, shall be, and the same is hereby, repealed.

² As to the recent exception to this in revenue causes, see *infra*.

The thing in controversy, under this statute, must be capable of pecuniary estimation. It has, therefore, been held, that where the subject of the controversy is the right to hold or exercise an office of trust, as the guardianship of a minor, which has no value, except so far as it affords a compensation for labor and services to be performed, an appeal does not lie under the statute.¹ The principle of this case is equally applicable to the statute provision for writs of error. So, too, a writ of error will not lie where the controversy is between parties claiming adversely the custody of an infant child, as that is a thing incapable of being reduced to any pecuniary standard of value. The matter in dispute must be money, or some right, the value of which, in money, can be calculated and ascertained.² It must also be a civil case,

¹ *Ritchie v. Mauro*, 2 Peters, 243.

² *Barry v. Mercein*, 5 How. 103. Mr. Ch. Justice Taney, delivering the opinion of the court in this case, said: "By the Constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by Act of Congress; nor can it when conferred be exercised in any other form, or by any other mode of proceeding than that which the law prescribes.

"The Act of 1789, ch. 20, § 22, provides that final judgments and decrees in civil actions and suits in equity in a circuit court, when the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, may be re-examined and reversed or affirmed in the Supreme Court. And it is by this law only that we are authorized to re-examine any judgment in a circuit court by writ of error.

"Before we speak more particularly of the construction of this section, it may be proper to notice the difference between the provisions contained in it and those of the twenty-fifth section, in the same Act of Congress, which gives the appellate power over the judgments of the state courts. In the latter case, the right to re-examine is not made to depend on the money value of the thing in controversy, but upon the character of the right in dispute, and the judgment which the state court has pronounced upon it; and it is altogether immaterial whether the right in controversy can or cannot be measured by a money standard.

"But in the twenty-second section, which is the one now under consideration, the provision is otherwise; and in order to give this court jurisdiction to re-examine the judgment of a circuit court of the United States, the judgment or decree must not only be a final one, in a civil action or suit in equity, but the matter in dispute must exceed the sum

where the subject in contest has a value beyond the sum mentioned in the act. Therefore, in criminal cases, where the question is the guilt or innocence of the accused, a writ of error does not lie.¹ But it will lie to a peremptory man-

or value of two thousand dollars, exclusive of costs. And in order, therefore, to give us appellate power under this section, the matter in dispute must be money, or some right, the value of which, in money, can be calculated and ascertained.

"In the case before us, the controversy is between the father and mother of an infant daughter. They are living separate from each other, and each claiming the right to the custody, care, and society of their child. This is the matter in dispute, and it is evidently utterly incapable of being reduced to any pecuniary standard of value, as it rises superior to money considerations.

"The question for this court to decide is, whether a controversy of this character can, by a fair and reasonable construction, be regarded as within the provisions of the twenty-second section of the Act of 1789. Is it one of those cases in which we are authorized to re-examine the decision of a circuit court of the United States, and affirm or reverse its judgment? We think not. The words of the Act of Congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated in the ordinary mode of a business transaction. There are no words in the law which, by any just interpretation, can be held to extend the appellate jurisdiction beyond those limits, and authorize us to take cognizance of cases to which no test of money value can be applied. Nor, indeed, is this limitation upon the appellate power of this court confined to cases like the one before us. It is the same in judgments in criminal cases, although the liberty or life of the party may depend on the decision of the circuit court. And since this court can exercise no appellate power unless it is conferred by Act of Congress, the writ of error in this case must be dismissed."

¹ *United States v. Moore*, 3 Cranch, 159; *Ex parte Kearney*, 7 Wheaton, 38, 42. The Judiciary Act of 1789 made no provision for the revision by the Supreme Court of the judgments of the circuit or district courts in criminal cases; and the Act of 1802 only embraced cases in which the opinions of the judges were opposed in criminal cases. There is, therefore, no general law giving appellate jurisdiction to the Supreme Court in such cases. But the Act of February 22d, 1847, ch. 17, providing that certain cases might be brought up from the territorial courts of Florida to the Supreme Court, included all cases, whether of civil or criminal jurisdiction. Under this act it was held, that the Supreme

damus to restore to an office, where the value of the office can be ascertained by the salary.¹

§ 172. Such being the character of the controversy, a question arises how the value is to be ascertained. This depends upon the judgment in the court below, and the party who sues out the writ of error. The amount in controversy is to be decided by the sum in controversy at the time of the judgment below, as it appears on the writ of error, and not by any subsequent additions thereto, such as interest. Where the plaintiff sues for an amount exceeding \$2000, and the *ad damnum* exceeds \$2000, if by reason of any erroneous ruling of the court below, the plaintiff recovers nothing, or less than \$2000, there the sum claimed by the plaintiff is the sum in controversy for which a writ of error will lie, because the sum which his declaration shows to be due may still be recovered, if the judgment below should be reversed. But if a verdict is given against the defendant below for a less sum than \$2000, and judgment passes against him accordingly, it is obvious there is, on the part of the defendant, nothing in controversy beyond the sum for which the judgment is given, and, consequently, he is not entitled to any writ of error.²

Court could revise a judgment of the Superior Court of the District of West Florida, in a criminal case which originated in October, 1845, and was transferred to the District Court of the United States for the Northern District of Florida. *Forsyth v. The United States*, 9 Howard, 571.

¹ *The Columbian Ins. Co. v. Wheelwright*, 7 Wheat. 534.

² *Knapp v. Banks*, 2 Howard, 73; *Gordon v. Ogden*, 3 Peters, 33; *Winston v. The United States*, 3 How. 771; *The United States v. McDowell*, 4 Cranch, 316; *Smith v. Honey*, 3 Peters, 469. The court cannot judicially take notice, that by computation it may possibly be made out as matter of inference from the declaration, that the plaintiff's claim, in reality, must be less than the statute sum; much less can it take such notice in a case where the plaintiff might be allowed interest on his claim by the jury, so as to swell it beyond the statute sum. *Scott v. Lunt*, 6 Peters, 349.

The court will not take jurisdiction of a case where, although the whole property claimed by the lessor of the plaintiff in error under a

§ 173. In actions of trover, replevin, and detinue, the rule depends on the nature and objects of the suit. In an action of trover, if the judgment below be for the plaintiff, that judgment ascertains the value of the matter in dispute; but if it be for the defendant, the value of the matter in dispute upon the writ of error in the Supreme Court is the sum claimed as damages in the declaration.¹ So, too, in other actions sounding in damages, as trespass, the sum laid in the declaration is the standard of value, for a writ of error, when judgment below is for the defendant.² But actions of replevin stand upon different principles. The damages are not the principal subject in dispute. If the replevin be for goods distrained for rent, the amount for which avowry is made is the real matter in dispute. If the writ be issued as a means of trying the title to property, the value of the article replevied is the matter in dispute.³

§ 174. Where the plaintiff in the court below filed a petition, in the nature of an action of detinue, for the recovery from the defendant of four slaves, whose value he alleged to be \$2700, and the jury found a verdict for the plaintiff "for \$1200, the value of the negro slaves in suit," and thereupon the plaintiff released the judgment for the \$1200, and the court adjudged that he recover the slaves of the defendant, so that the value as found formed no part of the judgment brought up by the writ of error, it was held, that the allegation in the petition must be taken as fixing the value, for the purposes of jurisdiction.⁴

patent, and which was recovered in ejectment, exceed \$2000, the title to a lot, part of the whole tract, of less value than \$500, was alone in controversy in the suit: *Grant v. McKee*, 1 Peters, 248.

¹ *Cooke v. Woodrow*, 5 Cranch, 13.

² *Hulscamp v. Teel*, 2 Dallas, 358.

³ *Peyton v. Robertson*, 9 Wheaton, 527.

⁴ *Bennett v. Butterworth*, 8 Howard, 124. Mr. Ch. J. Taney, delivering the opinion of the court, said:—

"The court have considered the motion made in this case to dismiss the writ of error for want of jurisdiction. From the mode of judicial

§ 175. It follows, as a necessary consequence, from the principle that the Supreme Court is to ascertain for itself its

proceeding adopted in Texas, the motion presents a new question, and one that is not free from difficulty.

"The suit is not brought in any of the forms of action known to the common law. It is instituted by petition, and the plaintiff in the court below seeks to recover four slaves, which he alleges are his property, and are detained from him by the defendant. The value of each slave is averred separately in the petition, the whole amounting to two thousand seven hundred dollars. The verdict of the jury is as follows: 'We the jury find for the plaintiff twelve hundred dollars, the value of the negro slaves in suit, with six and a quarter cents damages.'

"And the record states, that thereupon the plaintiff released the judgment for twelve hundred dollars in open court, and the court adjudged that he recover of the defendant the said slaves and the damages assessed by the jury, and his costs.

"This proceeding appears to be a substitute for the common law action of detinue, and resembles it in many respects. In that action, if the jury find that the property belongs to the plaintiff, and is detained from him by the defendant, they ought to find at the same time the value of each separate article in dispute, and the judgment of the court is that the plaintiff recover the property, or the value thereof as found by the jury, provided he cannot obtain possession of the property, together with his damages and costs. Upon such a judgment a writ of error certainly would not lie, when the value assessed by the jury was less than two thousand dollars; for the value of the property in dispute would be fixed by the verdict and the judgment of the court, and both parties would be bound by it.

"But in the case before us, the finding of the jury and the judgment of the court differ from the proceedings in an action of detinue. The gross value of the four slaves is found by the jury, and not the separate value of each of them. And the value as found forms no part of the judgment of the court. The plaintiff was permitted to release it; and although it is said in the record that he released the *judgment* for this sum, yet it appears that no judgment was rendered for it, and that it was released before any was given.

"The judgment of the District Court, therefore, decides nothing more than the right to the property specified in the petition; and whether that judgment is erroneous or not, is all that this court can examine into upon the writ of error. The sum which the plaintiff below (who is the defendant in error here) is entitled to recover, if the property is placed beyond his reach, and he fails to obtain possession of it, can form no part of the judgment of this court. The only matter in controversy is the

own jurisdiction, that if the writ of error shows the subject-matter in controversy to be capable of a pecuniary valuation,

four slaves; and their actual value, whatever it may be, is the value of the matter in dispute.

"Now, if the judgment of the District Court had been for the defendant, the plaintiff would evidently have been entitled to maintain a writ of error; and as he sues for the specific property, and avers the value to be \$2700, he would have been entitled to the writ, even if he had laid his damages for the detention below \$2000. For the averment of value when he sues for property, shows the value of the thing in controversy, as much as the averment of debt or damages, when he sues for money. And when he has rejected the value found by the jury, and refused a judgment for it, and is not bound by that finding, can he bind the defendant to it, and thereby deprive him of his writ of error, upon the ground that the property in dispute is not worth \$2000?

"This is the question upon the motion before us.

"In cases where the plaintiff sues for money, and claims in his pleadings a larger sum than \$2000, and obtains a judgment for a smaller amount, the sum for which the judgment is rendered is the only matter in controversy, when the defendant brings the writ of error. Because, if the plaintiff rests satisfied with it, and takes no step to reverse it, he is bound by it as well as the defendant. Both parties, therefore, stand upon an equal footing in that respect. But if the plaintiff brings the writ of error upon the ground that he is entitled to more than the judgment was rendered for, then his averment in his declaration shows the amount he claimed; and as that claim is the matter for which he brings suit, he is entitled to the writ of error, if that claim appears to be large enough to give jurisdiction to this court. These principles have been settled in this court by the cases referred to in the argument. In the case before us, the plaintiff avers in his petition that the slaves for which the suit is brought are worth \$2700. The right to these slaves must be the only matter in controversy here, whether the writ of error is sued out by the plaintiff or defendant. If by the plaintiff, he would undoubtedly be entitled to it, upon the ground that the property in dispute, and which he is seeking to recover in this suit, is claimed to be worth more than two thousand dollars; and he would be entitled, under the decisions of this court, to rely on the averment in his petition, to show that the amount in value of the slaves he claimed is sufficient to give jurisdiction to this court. Can he, then, be permitted to deny here the truth of his own averment, when precisely the same thing—the same property—is the matter in controversy upon the writ of error brought by the defendant? We think not. And as by his release he prevented a judgment from being entered, fixing the value, as between these parties in this

but the nature of the action does not require the value of the thing demanded to be stated in the declaration, the Supreme Court will hear *viva voce* evidence of the value.¹ But the *onus probandi* is upon the party seeking to obtain a revision of the case, to establish the jurisdiction.²

§ 176. Where the contract sued on is for foreign money, and the value of the money is not averred, the verdict of the jury, finding the value, will fix the same for jurisdiction.³

§ 177. The next requisite for a writ of error to a judgment of a circuit court is, that the judgment should have been final. A writ of error does not lie, therefore, to a refusal of a circuit court to quash an execution;⁴ or to a refusal to grant a continuance of a cause;⁵ or to grant a new trial;⁶ or to grant an amendment;⁷ or to an order or

suit, at \$1200, the averment in his petition must be regarded as determining the amount in controversy upon a writ of error brought by either plaintiff or defendant. Consequently, this court has jurisdiction upon this writ, and the motion to dismiss it must be overruled."

¹ Ex parte Bradstreet, 7 Peters, 634, 647.

² Hagan v. Foison, 10 Peters, 160. ³ Brown v. Barry, 3 Dall. 365.

⁴ Boyle v. Zacharie, 6 Peters, 635, 657. In this case, Mr. Justice Story said, "We consider all motions of this sort to quash executions, as addressed to the sound discretion of the court; and as a summary relief, which the court is not compellable to allow. The party is deprived of no right by the refusal; and he is at full liberty to redress his grievance by writ of error or *audita querela*, or other remedy known to the common law. The refusal to quash is not, in the sense of the common law, a judgment; much less is it a final judgment. It is a mere interlocutory order. Even at the common law, error only lies from a final judgment, and by the express provisions of the Judiciary Act of 1789, chap. 20, sec. 22, a writ of error lies to this court only in cases of final judgments." See also Evans v. Gee, 14 Peters, 1; Mountzel v. Hodgson, 4 Cranch, 324.

⁵ Woods v. Young, 4 Cranch, 237.

⁶ Henderson v. Moore, 5 Cranch, 11; U. States v. Evans, Ib. 280; Barr v. Gratz, 4 Wheat. 213.

⁷ Marine Insurance Company v. Hodgson, 6 Cranch, 206; Walden v. Craig, 9 Wheat. 576; Chirac v. Reinicker, 11 Wheat. 280.

judgment in the nature of an order setting aside a verdict, for the purpose of awarding a *venire facias de novo*.¹ So, too, a case cannot be brought by writ of error from a circuit court upon an agreed statement of facts, and the judgment of the circuit court on those facts, without any of the proceedings in the court below being in the record, because it cannot appear that the Supreme Court has jurisdiction.² Nor will a writ of error lie to a judgment nisi, or an order in its nature interlocutory.³ But a writ of error

¹ The Chesapeake and Ohio Canal Company v. The Union Bank of Georgetown, 8 Peters, 259. This was a writ of error to a judgment of a circuit court quashing an inquisition: the law under which the proceedings were had authorizing the court "at its discretion, as often as may be necessary, to direct another inquisition to be taken." The Supreme Court said it was in the nature of an order setting aside a verdict, for the purpose of awarding a *venire facias de novo*.

² Keene v. Whittaker, 13 Peters, 459. But it seems that where there has been a general verdict upon a statement of facts, subject to the opinion of the circuit court, a writ of error lies. Brent v. Chapman, 5 Cranch, 358; Faw v. Roberdeau, 3 Cranch, 174.

³ Levy v. Fitzpatrick, 15 Peters, 167. This was a writ of error to an order of the Circuit Court for the Eastern District of Louisiana, directing executory process, to which the plaintiff below was entitled, upon a mortgage made by public act, importing a confession of judgment, and entitling the plaintiff to such process. The Supreme Court said: "By the 22d section of the Judiciary Act, final judgments in civil actions commenced in the circuit courts, by original process, may be re-examined and reversed or affirmed upon a writ of error. It is obvious that the debtors were not before the judge, in this case, by the service of process, or by voluntary appearance, when he granted the executory process. In that aspect of the case, then, the order could not be regarded as a final judgment, within the meaning of the 22d section of the statute. But was the order or final judgment according to the laws of Louisiana? The fact of its being subject to appeal does not prove that it was, as has already been shown. Nor could it, *per se*, give to the execution of the process, ordered by the judge, the dignity of a judicial sale. Unless, at least, three days' previous notice were given to the debtors, the sale would be utterly void: Grant and Olden v. Walden, 5 L. R. 631. This proves that some other act was necessary, on the part of the plaintiffs, to entitle them to the fruits of their judgment by confession. And in that act is involved the merits of the whole case; because, upon that notice, the debtors had a right to come into court and file their petition, which is

will lie to a judgment awarding a peremptory mandamus to restore to office, where the matter in controversy is sufficient to give the Supreme Court jurisdiction, for such a judgment is in all respects final.¹

§ 178. A judgment of a circuit court on a writ of error *coram vobis*, is not a judgment to which a writ of error will lie from the Supreme Court.² Errors of law only are re-

technically called an opposition, and set up, as matter of defence, everything that could be assigned for error here, and pray for an injunction to stay the executory process till the matter of the petition could be heard and determined. And upon an answer to the petition coming in, the whole merits of the case between the parties, including the necessary questions of jurisdiction, might have been tried, and final judgment rendered. Articles 738, 739, of the Code of Practice. From this view of the case, we think the order, granting executory process, cannot be regarded as anything more than a judgment nisi. To such a judgment a writ of error would not lie. The writ of error, in this case, must therefore be dismissed."

¹ The Columbian Ins. Co. v. Wheelwright, 7 Wheat. 534.

² Pickett's Heirs v. Legerwood, 7 Peters, 144. The Court said: "The judgment below was rendered on a writ of error *coram vobis*, sued out in the same court, for the purpose of correcting an error committed at a previous term, and into which, it was contended, the court had been surprised. We are not now called upon to decide on the merits of the cause below, nor whether it was a case proper for the application of that remedy. The motion here is to quash the writ of error, upon the ground that it is an exercise of jurisdiction in the court below which does not admit of revision in this tribunal; that it is but a different form or mode of exercising the power of the court of the first resort over its own acts, and is therefore subject to the same exceptions which have always been sustained in this court, against revising the interlocutory acts and orders of the inferior courts.

"It cannot be questioned that the appropriate use of the writ of error *coram vobis*, is to enable a court to correct its own errors; those errors which precede the rendition of judgment. In practice the same end is now generally attained by motion; sustained, if the case require it, by affidavits; and it is observable, that so far has the latter mode superseded the former in the British practice, that Blackstone does not even notice this writ among his remedies. It seems it is still in use in some of the states; and upon points of fact to which the remedy extends, it might, perhaps, be beneficially resorted to as the means of submitting a litigated

examinable in the Supreme Court, and it has therefore no power to grant a new trial by a re-examination of the facts

fact to the decision of a jury, an end which, under the mode of proceeding by motion, might otherwise require a feigned issue, or impose upon a judge the alternative of deciding a controverted point upon affidavit, or opening a judgment perhaps to the material prejudice of the plaintiff, in order to let in a plea.

"But in general, and in the practice of most of the states, this remedy is nearly exploded, or at least superseded by that of amending on motion. The cases in which it is held to be the appropriate remedy will show that it will work no failure of justice, if we decide that it is not one of those remedies over which the supervising power of this court is given by law.

"The cases for error *coram vobis* are enumerated without any material variation in all the books of practice, and rest on the authority of the sages and fathers of the law. I will refer to the pages of Archbold for the following enumeration (1st vol. 234, 276, 277, 278, 279): 'Error in the process or through default of the clerk; error in fact, as where the defendant being under age sued by attorney, in any other action but ejectment; that either plaintiff or defendant was a married woman at the commencement of the suit; or died before verdict or interlocutory judgment, and the like.'

"But all the books concur in quoting the language of Roll's Abridgment, p. 749, 'that if the error be in the judgment itself, and not in the process, a writ of error does not lie in the same court, but must be brought in another and superior court.'

"The writ of error in this case was but a substitute for a motion to the court below, to correct an error of its own, in granting improvidently a motion for leave to amend. Many years had elapsed since entering a judgment in ejectment; the term declared on had long since expired; the terre tenant was changed; only one of the original defendants survived, and he had removed to a great distance from the premises recovered; on him alone notice of the motion was served; and the court, unaware of these facts, granted leave to amend the declaration in the original suit, by extending the term more than twenty years, so as to enable the plaintiffs to sue out a writ of possession. This writ of error was sued out to enable the court below to correct that error; they have ordered that it shall be corrected; and from that order to set aside the former order, and quash the writ of possession, is the appeal now made to the reversing power of this court.

"We think the case comes precisely within the rule laid down by this court in the case of *Waldon v. Craig*, 9 Wheat. 576, with this difference, that the latter was a case in which the court thought so favorably of the claim of the plaintiff in error, that they would have sustained the suit if

tried by a jury; and in general, matters of practice do not constitute subjects upon which errors can be assigned.¹

§ 179. A third requisite to a valid writ of error to a circuit court is, that a citation to the adverse party should be served at least thirty days before the first day of the term of the Supreme Court to which the writ is returnable.² The Supreme Court will not compel a cause to be heard, unless the citation be served thirty days before the first day of term.³

§ 180. A fourth requisite is, that the writ of error should be brought within five years after rendering or passing the judgment complained of; or in case the person entitled to the writ be an infant, *feme covert*, *non compos mentis*, or imprisoned, then it must be brought within five years, ex-

it had been possible. The court there express themselves thus: 'There is peculiar reason in this case, where the cause has been protracted, and the plaintiff kept out of possession beyond the term laid in the declaration, by the excessive delays practised by the opposite party. But the course of this court has not been in favor of the idea that a writ of error will lie to the opinion of a circuit court granting or refusing a motion like this. No judgment in the cause is brought up by the writ, but merely a decision on a collateral motion, which may be renewed.'

"In that case, as in this, the motion was to extend a term in ejectment, after judgment: but where the plaintiff's delay in proceeding with his writ of possession was not attributable to his own laches. He had been arrested in his course by successive injunctions sued out by the defendants. This court did there recognise the case of delay by injunction as one in which, in that action, the court might exercise the power to enlarge the term even after judgment, and the particular case as one which merited that exercise of discretion; but dismissed the writ of error because it was a case proper for the exercise of that discretion, and not coming within the description of an error in the principal judgment."

¹ *Parsons v. Bedford*, 3 Peters, 433, 445.

² Act of 24 Sept. 1789, sect. 22.

³ *Welsh v. Mandeville*, 5 Cranch, 321; *Lloyd v. Alexander*, 1 Cranch, 365. If the defendant in the circuit court intermarries after the judgment, and before service of the citation, the citation must be served on her husband. *Fairfax, Ex'r, v. Fairfax*, 5 Cranch, 19.

cluding the time of such disability; and the plaintiff in error must give security to prosecute his writ to effect, and to answer all damages and costs, if he fail to make his plea good.¹ But it is not essential that the security should be perfected within the five years, if the writ of error was allowed within the five years;² and where the writ of error is not a supersedeas or stay of execution, the security need only be for costs.³

§ 181. Where it is intended that the writ of error shall operate as a supersedeas and stay of execution in the original cause, a copy of the writ must be lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after the rendition of the judgment or decree complained of. Until the expiration of ten days, executions are not to issue in any case where a writ of error may be a supersedeas; but where the Supreme Court affirms the judgment or decree of the court below, just damages are to be awarded to the respondent in error for his delay, and single or double costs at discretion.⁴ If the writ of error is not brought so as to operate as a supersedeas, execution may issue in the court below.⁵

§ 182. It was formerly held that no writ of error lies to the Supreme Court, to reverse the judgment of a circuit court in a civil action, which has been carried up to the circuit court from the district court by writ of error.⁶ But this has been altered by statute, and such cases are now re-examinable in the Supreme Court, in the same manner as if they had been originally commenced in the circuit court.⁷ It seems that a writ of error must be applied for, by the party

¹ Statute of 1789, sect. 22.

² At least it has been so held in relation to admiralty appeals. The *Dos Hermanos*, 10 Wheat. 306.

³ Act of December 12, 1794.

⁴ Act of 1789, § 23.

⁵ *Wallen v. Williams*, 7 Cranch, 278, 602.

⁶ The *United States v. Goodwin*, 7 Cranch, 108.

⁷ Act of July 4, 1840, § 3.

himself, or by some one who can show his authority, and not merely the authority of his friends.¹

§ 183. There are two classes of cases, however, in which, by special provision, a writ of error will lie, notwithstanding the amount in controversy is less than two thousand dollars. The Patent Act of July 4, 1836, § 17, provides that writs of error or appeals, as the case may require, in patent causes, shall lie to the Supreme Court of the United States, "in the same manner, and under the same circumstances, as is now provided by law in other judgments and decrees of circuit courts, and in all other cases in which the court shall deem it reasonable to allow the same." The object of this statute was to secure uniformity of decision upon the patent laws: and, therefore, where a bill was brought to set aside a contract in relation to the use of a patented machine, and the dispute involved no question of construction of the patent laws, the amount in controversy not appearing to exceed two thousand dollars, it was held that the court below had no discretion to allow an appeal.² And in an action at law, if

¹ *Ex parte Dorr*, 3 Howard, 103.

² *Wilson v. Sandford*, 10 Howard, 99. In this case the Supreme Court said: "The object of the bill was to set aside a contract made by the appellant with the appellees, by which he had granted them permission to use, or vend to others to be used, one of Woodworth's planing machines, in the cities of New Orleans and Lafayette; and also to obtain an injunction against the further use of the machine, upon the ground that it was an infringement of his patent rights. The appellant states, that he was the assignee of the monopoly in that district of country, and that the contract which he had made with the appellees had been forfeited by their refusal to comply with its conditions. The license in question was sold for fourteen hundred dollars, a part of which, the bill admits, had been paid. The contract is exhibited with the bill, but it is not necessary in this opinion to set out more particularly its provisions.

"The appellees demurred to the bill, and, at the final hearing, the demurrer was sustained, and the bill dismissed. And the case is brought here by an appeal from that decree.

"The matter in controversy between the parties arises upon this contract, and it does not appear that the sum in dispute exceeds two thou-

the court below, in the exercise of their discretion, allow a writ of error, under this statute, as "reasonable," it must be

sand dollars. On the contrary, the bill and contract exhibited with it show that it is below that sum. An appeal, therefore, cannot be taken from the decree of the circuit court, unless it is authorized by the last clause in the seventeenth section of the Act of 1836.

"The section referred to, after giving the right to a writ of error or appeal in cases arising under that law, in the same manner and under the same circumstances as provided by law in other cases, adds the following provision: 'And in all other cases in which the court shall deem it reasonable to allow the same.' The words, 'in all other cases,' evidently refer to the description of cases provided for in that section, and where the matter in dispute is below two thousand dollars. In such suits, no appeal could be allowed but for this provision.

"The cases specified in the section in question are, 'all actions, suits, controversies and cases, arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries.'

"The right of appeal to this court is confined to cases of this description, when the sum in dispute is below two thousand dollars. And the peculiar privilege given to this class of cases was intended to secure uniformity of decision in the construction of the Act of Congress in relation to patents.

"Now, the dispute in this case does not arise under any Act of Congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no Act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles. The object of the bill is to have this contract set aside and declared to be forfeited; and the prayer is, 'that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the court,' and for an injunction. But the injunction he asks for is to be the consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside. And if the case made in the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not, in a court of chancery, depended altogether upon the rules and principles of equity, and in no degree whatever upon any Act of Congress concerning patent rights. And whenever a contract is made in relation to them, which is not provided for and regulated by Congress, the parties, if any dispute arises, stand upon the same ground with other litigants as to the right of appeal; and the decree of the circuit court cannot be

upon the whole case, and not upon certain points of the case, and because the construction of the patent laws, or some right under them is involved.¹

§ 184. Another class of cases in which writs of error will lie, as a matter of right, by special provision, are civil actions brought by the United States for the enforcement of the revenue laws. In these cases, writs of error from the final judgments of the circuit courts may be brought by either party, without reference to the amount in controversy.² The revenue of the post-office is a part of the revenue of the government, for this purpose. So that in an action of debt brought under the Act of March 3, 1825, "for the prevention of frauds on the revenue of the Post-Office Department," a writ of error will lie, whatever may be the amount in controversy.³ But the judgment must be a final judgment of a circuit court; and, therefore, where a case was brought from the Court of Appeals of the Territory of Florida, and the amount in controversy did not exceed one thousand dollars—the amount fixed by statute for writs of error from the territorial court—it was dismissed for want of jurisdiction.⁴

§ 185. The next form in which the appellate jurisdiction of the Supreme Court is extended to cases in the circuit courts, is by appeal: and this embraces cases in equity and cases in admiralty. We have already seen that the Judiciary Act provided only the process of a writ of error, by which cases of any description could be carried from the circuit courts to the Supreme Court. A writ of error is strictly a common law process, and removes for re-examination nothing

revised here, unless the matter in dispute exceeds two thousand dollars."

¹ *Hogg v. Emerson*, 6 Howard, 437, 477; *Curtis on Patents*, § 407.

² Act of May 31, 1844, ch. 31.

³ *The U. States v. Bromley*, 12 Howard, 88.

⁴ *The U. States v. Carr*, 8 Howard, 1.

but the law.¹ It was soon perceived to be necessary that provision should be made for the more appropriate mode of carrying up both the law and the fact involved in cases in equity and admiralty, by appeal, which is a civil law process, and removes the whole cause. Accordingly, it was provided by the Act of March 3, 1803, that "from all final judgments or decrees rendered or to be rendered in any circuit court, or in any district court acting as a circuit court, in any cases of equity, of admiralty, and maritime jurisdiction, and of prize or no prize, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of two thousand dollars, shall be allowed to the Supreme Court of the United States, and that upon such appeal, a transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause, shall be transmitted to the said Supreme Court; and that no new evidence shall be received in the said court, on the hearing of such appeal, except in admiralty and prize cases, and that such appeals shall be subject to the same rules, regulations, and restrictions, as are prescribed in law in case of writs of error; and that the said Supreme Court shall be, and hereby is authorized and required to receive, hear, and determine such appeals."²

§ 186. This act, then, has no reference to actions at law, and authorizes appeals to the Supreme Court only in cases in equity and admiralty.³ But it adopts the rules, regulations, and restrictions contained in the Act of 1789, which respect the time within which a writ of error may be brought, and in what instances it shall operate as a supersedeas; the

¹ *Wiscart v. Dauchy*, 3 Dall. 321. ² Act of March 3, 1803, ch. 40, § 2.

³ *The San Pedro*, 2 Wheat. 132, 141, 142; *Parish v. Ellis*, 16 Peters, 451, 453. All suits brought to settle legal rights which are not of equity or admiralty jurisdiction, whatever their peculiar forms may be, are cases at law, within the meaning of those terms as used in the Constitution and Acts of Congress. *Parsons v. Bedford*, 3 Peters, 433, 447; *Parish v. Ellis*, *ut supra*. A proceeding by mandamus is at common law: *Ward v. Gregory*, 7 Peters, 633.

citation to the adverse party; the security to be given by the plaintiff in error for prosecuting his suit; and the restrictions upon the appellate court as to reversal in certain enumerated cases. All these are applicable to appeals under the Act of 1803, and are to be substantially observed, except that where the appeal is prayed at the same term when the decree or sentence is made, a citation is not necessary.¹ It follows, that an appeal in admiralty, equity, and prize causes, may be taken at any time within five years from the final decree or sentence being pronounced, subject to the saving clause in the 22d section of the Act of 1789.²

§ 187. Final judgments or decrees only are within this provision for appeals. An interlocutory decree dissolving an injunction is not a decree from which an appeal can be taken;³ and an appeal does not lie from a decree making an injunction perpetual, and leaving some matters of account open for further consideration, upon which the parties are to take further proof.⁴ A decree awarding a new trial at law, in an action which the suit in equity is brought to restrain, is an interlocutory decree:⁵ and so is a decree for distribution of a sum reported to be in the hands of the executor, in a suit by residuary legatees, the whole of the assets of the estate not having been collected.⁶

§ 188. Where an appeal, taken from an original decree, from which an appeal lies, does not operate as a supersedeas of that decree, and the circuit court proceeds to make a supplemental decree of sale pursuant to the original decree appealed from, such supplemental decree is not a final decree, and cannot be appealed from.⁷ But a decree for a sale of

¹ The San Pedro, 2 Wheat. 132, 142; *Reiley v. Lamar*, 2 Cranch, 344.

² The San Pedro, *ut supra*.

³ *Young v. Grundy*, 6 Cranch, 51; *Hiriart v. Ballou*, 9 Peters, 156.

⁴ *Brown v. Swann*, 9 Peters, 1.

⁵ *Lea v. Kelly*, 15 Peters, 213.

⁶ *Young v. Smith*, 15 Peters, 237.

⁷ *Carr v. Hoxie*, 13 Peters, 460. Mr. Justice Story, delivering the opinion of the court in this case, said: "This is an appeal from a

mortgaged property, upon a bill to foreclose, is a final decree, and may be appealed from without waiting for the return and confirmation of the sale by a decretal order.¹ So, too,

decree in equity of the Circuit Court for the District of Rhode Island, made in a case where the appellant was the original defendant. The facts, so far as they are now before us upon the present record and appeal, are briefly these: The original decree was made at the June term of the circuit court, 1834; and, at the same time, an appeal was taken therefrom to the Supreme Court. The appeal was entered at January term, 1835, of the Supreme Court, and was dismissed for want of due prosecution at January term, 1837. At the November term of the circuit court, 1837, a petition was filed by the original appellant, praying for a new and second appeal from the original decree, which was granted by the court, upon bonds being given according to law. At the same term, the original plaintiff prayed for further proceedings to enforce the original decree, whereupon a supplemental decree was passed by the court for a sale of the premises in controversy, pursuant to the original decree; and from this last decree the original appellant claimed an appeal, which was granted by the court upon his giving bonds; and the case now comes before us solely upon this appeal, the record and proceedings in the original suit not having as yet been brought up and filed in the court, in pursuance of the second appeal from the original decree already referred to. The question, therefore, whether this second appeal lies to this court, after the dismissal of the former appeal, is not now before us, and can only arise when the original proceedings shall come before us, upon a due prosecution and entry of the second appeal. The only question now before us is, whether this second appeal is, under the circumstances, a supersedeas to all further proceedings in the circuit court to execute the original decree. If it is, then the appeal from the supplemental decree of sale is maintainable; otherwise, it ought to be dismissed. Upon full consideration, we are of opinion, that it is no supersedeas; and that the circuit court is at full liberty, in its discretion, to proceed to execute the original decree, if it shall deem it advisable; and that the supplemental decree of sale is but a decree in execution of the original decree, and not a final decree in the contemplation of the Acts of Congress, from which an appeal, like that now before us, lies. It must, therefore, be dismissed with costs. But, in order to guard against any misapprehension, it is proper to add, that this dismissal is in no sense to be construed to prevent the original proceedings and decree from being brought before this court upon the second appeal taken thereto in the circuit court, for full consideration, whether it lies or not."

¹ *Ray v. Law*, 3 Cranch, 179; *Whiting v. The Bank of the United States*, 13 Peters, 6, 15.

where a decree of the court below ordered certain deeds to be set aside, and that the complainant should recover certain property and a certain sum of money, and should have execution therefor, and that the master should take an account of the profits of the property, the bill to be retained for further decree as to the matters on which the master was to report, it was held that this was a final decree. But a decree that money shall be paid into court, or that property shall be delivered to a receiver, or be held in trust to be delivered to a new trustee, is interlocutory only.¹ And where

¹ *Forgay v. Conrad*, 6 Howard, 201. In this case, Mr. Ch. J. Taney, delivering the opinion of the court, said: "The question upon the motion to dismiss is, whether this is a final decree, within the meaning of the Acts of Congress. Undoubtedly, it is not final in the strict technical sense of the term. But this court has not, heretofore, understood the words 'final decrees' in this strict and technical sense, but has given them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature.

"In the case of *Whiting v. The Bank of the United States*, 13 Peters, 15, it was held that a decree of foreclosure and sale of mortgaged premises was a final decree, and the defendant entitled to his appeal without waiting for the return and confirmation of the sale by a decretal order. And this decision is placed by the court upon the ground that the decree of foreclosure and sale was final upon the merits, and the ulterior proceedings but a mode of executing the original decree. The same rule of construction was acted on in the case of *Michaud and Others v. Girod and Others*, 4 Howard, 503.

"The case before us is a stronger one for an appeal than the case last mentioned. For here the decree not only decides the property in dispute, and annuls the deeds under which the defendants claim, but also directs the property in dispute to be delivered to the complainant, and awards execution. And, according to the last paragraph in the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the master. In all other respects, the whole of the matters brought into controversy by the bill are finally disposed of as to all the defendants, and the bill as to them is no longer pending before the court, and the decree which it passed could not have been afterwards reconsidered or modified in relation to the matters decided, except upon a petition for a rehearing within the time prescribed by the rules of this court regulating proceedings in equity in the circuit courts. If these appellants, therefore, must wait until the accounts are reported by the master, and confirmed by the court, they will be subject to irreparable injury. For the

the court below decreed that the complainants were entitled to two-sevenths of certain property, and referred it to a

lands and slaves which they claim will be taken out of their possession and sold, and the proceeds distributed among the creditors of the bankrupt, before they can have an opportunity of being heard in this court in defence of their rights. We think upon sound principles of construction, as well as upon the authority of the cases referred to, that such is not the meaning of the Acts of Congress. And when the decree decides the right of the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorized an appeal to this court, although so much of the bill is retained in the circuit court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed.

"This rule, of course, does not extend to cases where money is directed to be paid into court, or property to be delivered to a receiver, or property held in trust to be delivered to a new trustee appointed by the court, or to cases of a like description. Orders of that kind are frequently and necessarily made in the progress of a cause. But they are interlocutory only, and intended to preserve the subject-matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be adjudicated by a final decree. The case before us, however, comes within the rule above stated, and the motion to dismiss is therefore overruled. We, however, feel it our duty to say that we cannot approve of the manner in which this case has been disposed of by the decree. In limiting the right of appeal to final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.

"In this respect the practice of the United States chancery courts differs from the English practice. For appeals to the House of Lords may be taken from an interlocutory order of the chancellor, which decides a right of property in dispute, and, therefore, there is no irreparable injury to the party by ordering his deed to be cancelled, or the property he holds to be delivered up, because he may immediately appeal; and the execution of the order is suspended until the decision of the appellate court. But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees. And if, by an interlocutory order or decree, he is required to deliver up property which he

master to take and report an account of the property, and reserved all other matters in controversy until the coming in

claims, or to pay money which he denies to be due, and the order immediately carried into execution by the circuit court, his right of appeal is of very little value to him, and he may be ruined before he is permitted to avail himself of the right. It is exceedingly important, therefore, that the circuit courts of the United States, in framing their interlocutory orders, and in carrying them into execution, should keep in view the difference between the right of appeal as practised in the English chancery jurisdiction and as restricted by the Act of Congress, and abstain from changing unnecessarily the possession of property or compelling the payment of money by an interlocutory order.

"Cases, no doubt, sometimes arise, where the purposes of justice require that the property in controversy should be placed in the hands of a receiver, or a trustee be changed, or money be paid into court. But orders of this description stand upon very different principles from the interlocutory orders of which we are speaking.

"In the case before us, for example, it would certainly have been proper, and entirely consistent with chancery practice, for the circuit court to have announced, in an interlocutory order or decree, the opinion it had formed as to the rights of the parties, and the decree it would finally pronounce upon the titles and conveyances in contest. But there could be no necessity for passing immediately a final decree annulling the conveyances, and ordering the property to be delivered to the assignee of the bankrupt. The decree upon these matters might, and ought to have awaited the master's report; and when the accounts were before the court, then every matter in dispute might have been adjudicated in one final decree; and if either party thought himself aggrieved, the whole matter would be brought here and decided in one appeal, and the object and policy of the Acts of Congress upon this subject carried into effect.

"The remarks are not made for the purpose of censuring the learned judge by whom the decree was pronounced; but in order to call the attention of the circuit courts to an inconvenient practice into which some of them have sometimes fallen, and which is regarded by this court as altogether inconsistent with the object and policy of the Acts of Congress in relation to appeals, and at the same time needlessly burdensome and expensive to the parties concerned, and calculated by successive appeals to produce great and unreasonable delays in suits in chancery. For it may well happen, that, when the accounts are taken and reported by the master, this case may again come up here upon exceptions to his report, allowed or disallowed by the circuit court, and thus two appeals made necessary, when the matters in dispute could more conveniently and speedily, and with less expense, have been decided in one."

of the report, it was held to be an interlocutory decree.¹ So, also, a decree setting aside a deed made by a bankrupt, directing the trustees under the deed to deliver over to the assignee in bankruptcy all the property remaining in their hands undisposed of, but without deciding how far the trustees might be liable to the assignee for the proceeds of sales previously made and paid away to the creditors, and directing an account of these proceeds to be taken, is not such a final decree as can be appealed from.² An order of the court below sustaining a demurrer to a petition because it was multifarious, and because the names of the persons claiming or in possession of the land, which the petitioners alleged belonged to them, is not a final judgment or decree, from which an appeal lies, for the title is not adjudicated.³

§ 189. In admiralty, a decree for restitution, with costs and damages, the report of the commissioners appointed to ascertain the damages not having been acted upon, is not a final decree.⁴ So, also, if the libel be *in personam* for damages, if the court decrees that damages be recovered, and that commissioners be appointed to ascertain the amount, an appeal will not lie until they have made their report.⁵

§ 190. The amount in controversy, which will authorize an appeal, in equity, or in admiralty, to the Supreme Court of the United States from a circuit court, is the same as that for which a writ of error will lie in an action at law. In equity, a bill filed to obtain a decree for the sale of land on which a deed has been given to secure the payment of a sum of money, the amount in controversy is not the value of the land, but the amount of the debt.⁶ Where the prayer of a

¹ Perkins v. Tourniquet, 6 Howard, 206.

² Pulliam v. Christian, 6 Howard, 209.

³ Heirs of De Armas v. The United States, 6 Howard, 103.

⁴ The Palmyra, 10 Wheaton, 502.

⁵ Chase v. Vasquez, 11 Wheat. 429.

⁶ Bank of Alexandria v. Hoof, 7 Peters, 168.

bill shows that the demand of the complainant is susceptible of definite computation, and that there can be no recovery beyond the sum of \$2000, an appeal cannot be taken.¹ The jurisdiction of the Supreme Court does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them; and, therefore, where a bill was filed to enjoin the marshal from levying an execution upon certain property for a less sum than \$2000, a decree dismissing the bill cannot be appealed from, although the entire value of the property may be more than \$2000.² In admiralty, in cases of seizure for breach of the revenue laws, the amount in controversy is the value of the property at the time of the seizure, exclusive of duties.³

§ 191. But where the property libelled is sold by agreement of the parties, and the proceeds of the sale, when deposited in the registry, amount to less than two thousand dollars, the case is not within the jurisdiction of the Supreme Court, notwithstanding an agreement filed by counsel admitting the value of the property to be more than two thousand dollars. Such an agreement would be evidence of the value, if nothing to the contrary appeared in the record.⁴

§ 192. In salvage cases, the amount in controversy is the sum awarded as salvage in the court below upon the property of each claimant, and not the aggregate amount of the whole salvage awarded.⁵ In equity, if the demand is susceptible

¹ Sewall v. Chamberlain, 5 Howard, 6.

² Ross v. Prentiss, 3 Howard, 771.

³ The United States v. 84 Boxes of Sugar, 7 Peters, 453.

⁴ Gruner v. The U. States, 11 Howard, 163. Where several owners of a cargo filed libels, *in rem*, against the vessel for damages done to their goods, and the libels were consolidated by the court below, and afterwards damages were decreed in favor of some of the libellants for more, and in some for less than \$2000, the cases, where the damages were less than that sum, were dismissed for want of jurisdiction. Rich v. Lambert, 12 Howard, 347.

⁵ Stratton v. Jarvis, 8 Peters, 4. In this case, Mr. Justice Story,

of definite computation, and the recovery must be for a sum less than two thousand dollars, the appeal will be dismissed.¹ If there is no allegation of value, and nothing in the record from which it can be computed, it may be proved.² The

delivering the opinion of the court, said: "The first question is, has this court jurisdiction to entertain the appeal, the aggregate amount of the whole salvage, exceeding the sum of two thousand dollars; but that which is due or payable by any distinct claimant being very far short of that sum. The argument in favor of the jurisdiction is, that the salvage service is entire, and that the decree is for a specified proportion or aliquot part of the whole of the gross sales, and, therefore, it is chargeable upon the proceeds as an entirety, and not upon the separate parcels thereof according to the interests of the separate owners. We are of a different opinion. In the appeal here, as in that from the district court, the case of each claimant having a separate interest must be treated as a separate appeal, *pro interesse suo*, from the decree, so far as it regards that interest; and the salvage chargeable on him constitutes the whole matter in dispute between him and the libellant; with the fate of the other claims, however disposed of, he has and can have nothing to do. It is true that the salvage service was in one sense entire; but it certainly cannot be deemed entire for the purpose of founding a right against all the claimants jointly, so as to make them all jointly responsible for the whole salvage. On the contrary, each claimant is responsible only for the salvage properly due and chargeable on the gross proceeds or sales of his own property, *pro rata*. It would otherwise follow, that the property of one claimant might be made chargeable with the payment of the whole salvage, which would be against the clearest principles of law on this subject. The district and circuit courts manifestly acted upon this view of the matter, and their decrees would be utterly unintelligible upon any other. Their decrees, respectively, in giving a certain proportion of the gross sales, must necessarily apportion that amount, *pro rata*, upon the whole proceeds, according to the distinct interests of each claimant. We are, therefore, of opinion, that we have no jurisdiction to entertain the present appeal in regard to any of the claimants, and the cause, for this reason, must be dismissed. The district court, as a court of original jurisdiction, has general jurisdiction of all causes of admiralty and maritime jurisdiction, without reference to the sum or value of the matter in controversy. But the appellate jurisdiction of this court and of the circuit courts depends upon the sum or value of the matter in dispute between the parties having independent interests." See also *Spear v. Place*, 11 Howard, 522.

¹ *Dick v. Runnels*, 5 Howard, 8.

² *The United States v. Hughes*, 11 Howard, 552, 569.

value of the matter in dispute has reference to the date of the decree below.¹

§ 193. A third form in which the appellate jurisdiction of the Supreme Court is exercised with reference to cases pending in the circuit courts, is by a certificate of a division of opinion upon some material point of law arising in the cause. The Act of April 29, 1802, ch. 31, s. 6, provides.—“ That whenever any question shall occur before a circuit court,

¹ *Bank of the U. States v. Daniels*, 12 Peters, 32, 54. In this case, the court said: “The Act of Congress provides that appeals shall be allowed to the Supreme Court, from final decrees rendered in the circuit courts, in cases of equity jurisdiction, where the matter in dispute, exclusive of costs, shall exceed the sum or value of two thousand dollars. The expression, sum or value of the matter in dispute, has reference to the date of the decree below, alike in case of appeals in equity and writs of error at law; they are each grounded on the original process of this court, operating on the final decree or judgment, and are limited to the sum or value then in controversy, and of which the decree or judgment furnishes the better evidence, should it furnish any. The matter in dispute below, was a claim to have deducted from the judgment at law one thousand dollars, with interest thereon, after the rate of six per centum, from the 8th of July, 1819, up to the date of the decree, in November, 1836, being upwards of seventeen years; and the circuit court decreed the reformation to be made of the judgment at law, by expunging therefrom, and as of its date, the one thousand dollars, with the interest. The effect was to cut off the interest that had accrued on the one thousand dollars, from the date of the judgment in 1827, to that of the decree, in 1836; interest on the principal sum recovered, being an incident of the contract by the laws of Kentucky, as well after judgment as before. The practical consequence of the decree will immediately be manifest when the bill is dismissed by the order of this court; the appellants will then issue their execution at law, and enforce the one thousand dollars, with the accruing interest, from the 8th of July, 1819, until payment is made; it follows, that upon the most favorable basis of calculation, and disregarding the statute of Kentucky, of 1789, giving ten per cent. damages in addition to legal interest on sums enjoined, the amount to which the decree below relieved the appellees, and deprived the bank of the right of recovery, was two thousand and forty dollars; that is, one thousand dollars principal, with seventeen years and four months of interest: this being the aggregate amount in dispute, and enjoined by the decree, of course the Supreme Court has jurisdiction.”

upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party, or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the Supreme Court, at their next session to be held thereafter; and shall, by the said court, be finally decided. And the decision of the Supreme Court, and their order in the premises, shall be remanded to the circuit court, and be there entered of record, and shall have effect according to the nature of the said judgment and order: Provided, that nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits; and provided, also, that imprisonment shall not be allowed, nor punishment in any case be inflicted, where the judges of the said court are divided in opinion upon the question touching the said imprisonment or punishment.”¹

§ 194. The intention of Congress, in passing this act, was that a division of the judges of the circuit court, upon single and material points in the progress of a cause, should be certified to the Supreme Court for its opinion, and not the whole cause. Where it appears, therefore, that the whole cause was submitted to the circuit court, the Supreme Court cannot take cognizance of it upon a certificate of division of opinion, for that would, in effect, be the exercise of original, rather than appellate jurisdiction, and would besides counteract the policy which forbids writs of error or appeals until the judgment or decree be final.² The points certified are alone

¹ Act of April 29, 1802, ch. 31, § 6. This act was intended to embrace criminal as well as civil cases. *Forsyth v. The United States*, 9 Howard, 571.

² *Wayman v. Southard*, 10 Wheaton, 1; *Adams v. Jones*, 12 Peters, 207; *White v. Turk*, 12 Peters, 238; *United States v. Bailey*, 9 Peters, 267, 272. Mr. Ch. J. Marshall, delivering the opinion in this last case, said, “The language of the section shows, we think, conclusively, that Congress intended to provide for a division of opinion on single points,

before the Supreme Court; the cause itself remains in the circuit court, and in the discretion of that court may be prosecuted.¹ If the record shows that the whole cause has been sent up to the Supreme Court, the case will be dismissed for want of jurisdiction.²

§ 195. The question to be certified under this statute must be one which arises in a cause depending before the court relative to a proceeding belonging to the cause, and not one

which frequently occur in the trial of a cause, not to enable a circuit court to transfer an entire cause into this court before a final judgment. A construction, which would authorize such transfer, would counteract the policy which forbids writs of error or appeal until the judgment or appeal be final. If an interlocutory judgment or decree could be brought into this court, the same case might again be brought up after a final decision, and all the delays and expense incident to a repeated revision of the same cause be incurred. So, if the whole, instead of an insulated point, could be adjourned, the judgment or decree which would be finally given by the circuit court, might be brought up by writ of error or appeal, and the whole subject be re-examined. Congress did not intend to expose suitors to this inconvenience; and the language of the provision does not, we think, admit of this construction. A division on a point, in the progress of a cause, on which the judges may be divided in opinion, not the whole cause, is to be certified to this court.

"The certificate of the judges leaves no doubt that the whole cause was submitted to the circuit court, by the motion of the counsel for the prisoner. The whole testimony in support of the prosecution had been submitted to the court, and upon this whole testimony the counsel for the prisoner moved the court to instruct the jury, that the evidence did not conduce to establish the offence denounced by any Act of Congress under which the indictment was framed. This instruction necessarily embraced the whole cause. Had it been given, the prisoner must have been acquitted. Had the court declared that the testimony did support the indictment, the whole law of the case would have been decided against the prisoner; and the jury must have convicted him, or have disregarded the instruction of the court.

"It has been repeatedly decided, that the whole cause cannot be adjourned on a division of the judges, and as this is, we think, a case of that description, we cannot decide it in its present form."

¹ *Kennedy v. Georgia Bank*, 8 Howard, 586.

² *Nesmith v. Sheldon*, 6 Howard, 41; *Webster v. Cooper*, 10 Howard, 54.

that arises after the decision of the cause. A division of opinion, therefore, upon a motion for a new trial, is not within the provision of the statute.¹ So, too, a division of

¹ *United States v. Daniel*, 6 Wheat. 542. In this case, Marshall, C. J., delivering the opinion of the court, said :—

“The motion for a new trial has never before been brought to this court on a division of opinion in the circuit court. It has been decided, that a writ of error could not be sustained to any opinion on such motion, and the reasons for that decision seem entitled to great weight, when urged against determining such a motion in this court, in a case where the judges at the circuits were divided on it. When we considered the motives which must have operated with the legislature for introducing this clause into the Judiciary Act of 1802, we were satisfied that it could not be intended to apply to motions for a new trial.

“Previous to the passage of that act, the circuit courts were composed of three judges, and the judges of the Supreme Court changed their circuits. If all the judges were present, no division of opinion could take place. If only one judge of the Supreme Court should attend, and a division should take place, the cause was continued till the next term, when a different judge would attend. Should the same division continue, there would then be the opinion of two judges against one; and the law provided, that in such case that should be the judgment of the court. But the Act of 1802 made the judges of the Supreme Court stationary, so that the same judge constantly attends the same circuit. This great improvement of the pre-existing system was attended with this difficulty. The court being always composed of the same two judges, any division of opinion would remain, and the question would continue unsettled. To remedy this inconvenience, the clause under consideration was introduced. Its application to motions for a new trial seems unnecessary. Such a motion is not a part of the proceedings in the cause. It is an application to the discretion of the court, founded on evidence which the court has heard, and which may make an impression not always to be communicated by a statement of that evidence. A division of opinion is a rejection of the motion, and the verdict stands. There is nothing then in the reason of the provision which would apply it to this case.

“Although the words of the act direct generally, ‘that whenever any question shall occur before a circuit court, upon which the opinion of the judges shall be opposed, the point upon which the disagreement shall happen shall be certified,’ &c., yet it is apparent that the question must be one which arises in a cause depending before the court relative to a proceeding belonging to the cause. The first proviso is, ‘That nothing herein contained shall prevent the cause from proceeding, if, in the

opinion upon the amount of the security to be given by the party applying for a writ of error, is not a question to be certified.¹ The question must also be a question of law, and not one that addresses itself solely to the discretion of the circuit court. Thus, where the question was whether a plaintiff in ejectment should be permitted to enlarge the term of the demise, it was held that it belonged to the mere discretion of the circuit court.² In like manner, questions respecting the practice of the court in equity causes, and which address themselves to the sound discretion of the court, in the application of the rules which regulate the course of proceedings to the circumstances of each particular case, are not of the character contemplated by the statute.³ And questions concerning the taxation of costs are not questions for a certificate.⁴

§ 196. The construction of the statute which forbids the whole cause to be certified for the opinion of the Supreme Court, does not prevent an agreed statement of all the facts,

opinion of the court, further proceedings can be had without prejudice to the merits.'

"It was also contended, that under the second proviso, Lewis Daniel ought to be discharged. That proviso is in these words: 'And provided also that imprisonment shall not be allowed, nor punishment in any case be inflicted, where the judges of the said court are divided in opinion upon the question touching the said imprisonment or punishment.'

"A motion for a new trial is not 'the question touching the said imprisonment or punishment.' That question must arise on the law, as applicable to the case; and is not, it would seem, to be referred to this court. The proviso, if applicable to such a case as this, would direct the circuit court not to certify their division of opinion to this court, but in consequence of that division to enter a judgment for the defendant."

¹ *Deveraux v. Marr*, 12 Wheat. 212.

² *Smith v. Vaughan*, 10 Peters, 366. Yet, although the motion addresses itself solely to the discretion of the circuit court, if the questions which arise, and upon which the judges differ, involve matter of right, it seems that they may be certified: *The United States v. The City of Chicago*, 7 Howard, 185.

³ *Packer v. Nixon*, 10 Peters, 408.

⁴ *Bank of U. S. v. Green*, 6 Peters, 26.

or a special verdict, from being made the groundwork of the questions that arise; and when such a statement of facts or special verdict is submitted to the opinion of the circuit court, it may and should be sent up with the record.¹ So, too, where a particular instruction to the jury is prayed for, and the judges of the circuit court differ in opinion, the whole of the evidence given on the trial is proper to be certified.² But where a special verdict is taken, subject to the opinion of the circuit court, upon points reserved, whether the law is for the plaintiff or the defendant, and the judges differ in opinion, care must be taken not to include in the record evidence fit only to be submitted to the jury; for if the points are too imperfectly stated to enable the Supreme Court to pronounce any opinion upon them, they will neither award a *venire facias de novo*, nor certify any opinion to the court below upon the points reserved, but will merely certify that they are too imperfectly stated.³

§ 197. Subject to these general principles, the statute embraces all questions of law that arise in the progress of a cause before judgment. Thus, the question whether the circuit court has jurisdiction;⁴ whether judgment ought to be arrested;⁵ what is the proper construction of a statute or an instrument;⁶ whether by law a particular process ought to issue;⁷ how judgment ought to be entered upon a given state of facts;⁸ whether particular evidence is admissible;⁹ whether

¹ Perkins v. Hart's Executors, 11 Wheat. 237; The Society for the Propagation of the Gospel v. The Town of Paulet, 4 Peters, 480; Harris v. Elliott, 10 Peters, 25; United States v. Gardner, 10 Peters, 618; Carlington v. The Merchants' Insurance Company, 8 Peters, 495.

² Willinks v. Hollingsworth, 6 Wheat. 240.

³ Perkins v. Hart, 11 Wheaton, 237.

⁴ 2 Cranch, 445; 5 Cranch, 288; 3 Wheat. 336; 11 Cranch, 467; 2 Peters, 586; 8 Peters, 532.

⁵ 4 Cranch, 167; 9 Cr. 243; 2 Wheat. 119.

⁶ 4 Cranch, 1; 5 Cr. 284; 1 Wheat. 476; 5 Wheat. 153; 8 Wheat. 1; 6 Peters, 1; 10 Peters, 137; 11 Peters, 102.

⁷ 7 Cranch, 279; Ibid. 504.

⁸ 9 Cranch, 292; 1 Peters, 318.

⁹ 10 Peters, 524.

the return on a process issued in the progress of a cause ought to be quashed;¹ whether an indictment is sufficient;² whether the evidence is sufficient to convict;³ and, in general, all questions of law that can be raised and presented upon facts, before the circuit court has finally acted upon the whole cause.⁴ But the jurisdiction embraces no question of fact whatever.⁵ Where there are several questions of law, arising at one time and at one stage of the cause, and involving little beyond one point, the practice of the court is to decide them; but otherwise, if they arise at different stages, or are anticipated, so as in fact to present the whole case.⁶

§ 198. There are other modes in which the Supreme Court may exercise its appellate jurisdiction, with reference to the other courts of the United States, and these are by writs of mandamus, prohibition, scire facias, and habeas corpus. These writs are specially provided for by statute, the two first being given to the Supreme Court, and the two latter to all the courts of the United States; which are also empowered to issue all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.⁷ And first, with regard to the writ of mandamus.

§ 199. The Judiciary Act authorizes the Supreme Court to issue writs of mandamus, "in cases warranted by the principles and usages of law, to any courts appointed [or persons holding office] under the authority of the United States."⁸ A writ of mandamus, according to the principles

¹ 10 Wheaton, 51.

² 7 Peters, 138.

³ 9 Peters, 238.

⁴ See the title "Divided Court," Peters' Digest, where the cases are collected, showing the course of practice.

⁵ The question whether, according to the true construction of a patent, the defendant's machine is an infringement, is a question of fact, which cannot be certified: *Wilson v. Barnum*, 8 Howard, 258, 261.

⁶ *United States v. Chicago*, 7 Howard, 185, 192.

⁷ Act of 24th Sept. 1789, ch. 20, § 13, 14.

⁸ *Ibid.* § 13. The words, "or persons holding office," have been held to

and usages of law, is a writ issuing from a superior to a court of inferior jurisdiction, requiring the latter to do something which in the ordinary course of its legal duty it is bound to do, and which does not depend simply upon its discretion. It has been held, that the issuing of this writ by the Supreme Court to an inferior court of the United States, is in the nature of appellate jurisdiction,¹ and it has been repeatedly issued; but a broad distinction has been preserved, in extending this remedial process, between acts of the inferior court which are merely ministerial, and those which are judicial and involve discretion, and belong to the province of judgment. Thus the Supreme Court will issue a mandamus to a circuit or district court to sign a bill of exceptions;² to sign judgment,³ or to proceed to judgment.⁴ But where the

convey a grant of power to the Supreme Court, not warranted by the Constitution. See *ante*.

¹ *Ex parte Crane and Another*, 5 Peters, 190, 193.

² *Ibid*.

³ *Life and Fire Insurance Co. v. Wilson's Heirs*, 8 Peters, 291, 304; *Same v. Adams*, *Ibid*. 306. In the first of these cases, the Supreme Court said: "On a mandamus a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised, but they will, in a proper case, require the inferior court to decide. But, so far as it regards the case under consideration, the signature of the judge was not a matter of discretion. It followed as a necessary consequence of the judgment, unless the judgment had been set aside by a new trial. The act of signing the judgment is a ministerial and not a judicial act. On the allowance of a writ of error, a judge is required to sign a citation to the defendant in error; he is required, in other cases, to do acts which are not strictly judicial. The judgment may be erroneous, but this is no reason why the judge should not sign it. Until his signature be affixed to the judgment, no proceedings can be had for its reversal. He has, therefore, no right to withhold his signature, where, in the exercise of his discretion, he does not set aside the judgment. As well might a judge refuse to enter up the judgment upon a verdict, which he would not or could not set aside, as to withhold his signature in the present case. The cause should be placed in such a posture as to enable the plaintiffs to proceed to another trial, or to take out execution on their judgment. As the former has not been done, the latter may be claimed by the plaintiffs as a matter of right."

⁴ *Life and Fire Ins. Co. v. Adams*, 9 Peters, 573, 604; *Ex parte Bradstreet*, 7 Peters, 634.

court below is acting judicially, and in the exercise of its discretion, the Supreme Court will not interfere by mandamus. Thus it will not grant a mandamus to set aside a judgment entered by default, which is an application addressed to the discretion of the court rendering the judgment, and not distinguishable in principle from an application for a new trial.¹ So, too, a mandamus will not be directed to an inferior court, directing it to restore to the record a plea which having been filed with another plea, had been ordered to be stricken from the docket; because the allowance of double pleas is not a matter of absolute right, but a matter of discretion.² Nor will the Supreme Court exercise any control over the action of the court below in refusing or admitting amendments to pleadings,³ or direct, by mandamus, a particular plea to be withdrawn, and another to be filed.⁴

§ 200. In a case where a mandamus was asked, for the purpose of ordering the court below to enter up judgment upon a verdict, it appearing that a motion for a new trial was pending, the Supreme Court refused it.⁵ A judge must exercise his discretion in those intermediate proceedings which take place between the institution and trial of a suit; and if in the performance of this duty he acts oppressively, the remedy is not in the Supreme Court. It would seem, therefore, that the court will not interfere on account of delays in proceedings to adjudicate,⁶ unless it appears that there is a wilful neglect or refusal of judicial duty.⁷ Although the Supreme Court will, in a proper case, order an inferior court to proceed to judgment, it will not direct it to render a particular judgment;⁸ and where judgment had been

¹ *Ex parte Roberts*, 6 Peters, 216.

² *Ex parte Davenport*, 6 Peters, 661, 662.

³ *Ex parte Bradstreet*, 7 Peters, 634.

⁴ *Bank of Columbia v. Sweeney*, 1 Peters, 567.

⁵ *Ex parte Bradstreet*, 8 Peters, 588.

⁶ *Ibid.*

⁷ *Life and Fire Ins. Co. v. Adams*, 9 Peters, 573, 604.

⁸ *Ibid.* In this case, the Supreme Court said: "Though the Supreme Court will not order an inferior tribunal to render judgment for or

rendered, and the court below had refused to issue execution, "after mature deliberation," there being nothing in the record to create a *prima facie* case of mistake, misconduct, or omission of duty, a rule to show cause why a mandamus should not issue was refused.¹ A mandamus is granted only where the law affords the party no other means of redress;² and the statements in the petition must be verified by affidavit.³

against either party, it will, in a proper case, order such court to proceed to judgment. Should it be possible, that in a case ripe for judgment, the court before whom it was depending could perseveringly refuse to terminate the cause, this court, without indicating the character of the judgment, would be required by its duty to order the rendition of some judgment, but, to justify this mandate, a plain case of refusing to proceed in the inferior court ought to be made out." See also *Ex parte Hoyt*, 13 Peters, 279, 290.

¹ *United States v. Trigg*, 11 Peters, 173. In this case, Mr. C. J. Taney, delivering the opinion of the court, said: "The court have looked into the practice of this court upon motions of this sort, and it does not appear to have been satisfactorily settled; and we have therefore thought it a fit occasion, when the court is full, to deliberate on the subject, and to state the principles by which the court will be guided.

"The district court upon which the rule is proposed to be laid, is a court of record, and the proceedings in the case before us appear to have been conducted in regular form, and the decision which has given rise to this motion to have been made after mature deliberation. For anything that appears before us, there may have been sufficient reason for this decision, and there is nothing in the record to create a *prima facie* case of mistake, misconduct, or omission of duty on the part of the district court. In such a state of facts, we think we are bound to presume that everything was rightfully done by the court, until some evidence is offered to show the contrary, and cannot, upon the proof before us, assume that there is any ground for the interposition of this court. A rule to show cause is a call upon the judge to explain his conduct, and implies that a case had been made out which makes it proper that this court should know the reason for his decision. We think, that in a case like this, such a rule ought not to be granted where the record does not show mistake, misconduct, or omission of duty on the part of the court, unless such a *prima facie* case to the contrary is made out, supported by affidavit, as would make it the duty of this court to interpose."

² *Kendall v. Stokes*, 3 Howard 87, 100.

³ *Ex parte Poulteney v. The City of La Fayette*, 12 Peters, 472.

§ 201. The Supreme Court has authority to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction.¹ Where the district court has no jurisdiction of a cause brought before it, a prohibition will be issued from the Supreme Court to prevent proceedings.²

§ 202. The fourteenth section of the Judiciary Act contains the following provision: "That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as judges of the district courts, has power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment: Provided, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."³

203. At an early period after the passage of this act, the question arose whether, upon its true construction, the Supreme Court had power to issue the great writ of *habeas corpus*, for the purpose of inquiring into the cause of commitment, in other cases than those which the Supreme Court itself has jurisdiction finally to decide, or whether it might also issue that writ in cases where the imprisonment was by the order of any other court of the United States. It was then settled, upon great consideration, that the first sentence of the statute grants the great writ of *habeas corpus* to all the courts of the United States, when in session; but as they

¹ Act of 24 Sept. 1789, c. 20, § 13.

² The United States v. Judge Peters, 3 Dallas, 121.

³ Act of 24 Sept. 1789, § 14.

are not always in session, the second sentence rests it in every judge of those courts also. It was also held, that the Supreme Court has jurisdiction to issue this writ, for the purpose of inquiring into the cause of commitment by any other court of the United States, and that this is a part of the appellate jurisdiction of the Supreme Court.¹ This case,

¹ Ex parte Bollman & Swartwout, 4 Cranch, 75, 93. Mr. Ch. J. Marshall, delivering the opinion of the court in this case, said:—

“Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court: and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied. The reasoning from the bar, in relation to it, may be answered by the single observation, that for the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.

“This opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves and their members from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between individuals, or between the government and individuals.

“To enable the court to decide on such question, the power to determine it must be given by written law.

“The inquiry, therefore, on this motion will be, whether by any statute compatible with the Constitution of the United States, the power to award a writ of *habeas corpus*, in such a case as that of Erick Bollman and Samuel Swartwout, has been given to this court.

“The 14th section of the Judicial Act (Laws U. S., vol. i. p. 58) has been considered as containing a substantive grant of this power.

“It is in these words: ‘That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. And that either of the justices of the Supreme Court, as well as justices of the district courts, shall have power to grant writs of *habeas corpus*, for the purpose of inquiry into the cause of commitment. Provided, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they

however, went no farther than to decide, that the Supreme Court may always, by *habeas corpus*, inquire into the cause of a commitment by any other court of the United States.

are in custody under or by color of the authority of the United States, and are committed for trial before some court of the same, or are necessary to be brought into court to testify.'

"The only doubt of which this section can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of *habeas corpus* as are necessary to enable the courts of the United States to exercise their respective jurisdictions in some cause which they are capable of finally deciding.

"It has been urged that in strict grammatical construction, these words refer to the last antecedent, which is 'all other writs not specially provided for by statute.'

"This criticism may be correct, and is not entirely without its influence; but the sound construction which the court thinks it safer to adopt, is, that the true sense of the words is to be determined by the nature of the provision, and by the context.

"It may be worthy of remark, that this act was passed by the first Congress of the United States, sitting under a Constitution which had declared 'that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it.' Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of *habeas corpus*.

"It has been truly said that this is a generic term, and includes every species of that writ. To this it may be added, that when used singly—when we say *the writ of habeas corpus*, without addition, we most generally mean that great writ which is now applied for; and in that sense it is used in the Constitution.

"The section proceeds to say, that 'either of the justices of the Supreme Court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.'

"It has been argued that Congress could never intend to give a power of this kind to one of the judges of this court, which is refused to all of them when assembled.

"There is certainly much force in this argument, and it receives additional strength from the consideration, that if the power be denied to

§ 204. Many years afterwards, the question arose, whether the Supreme Court has power, by *habeas corpus*, to inquire

this court, it is denied to every other court of the United States; the right to grant this important writ is given in this sentence to every judge of the circuit or district court, but can neither be exercised by the circuit nor district court. It would be strange if the judge, sitting on the bench, should be unable to hear a motion for this writ where it might be openly made, and openly discussed, and might yet retire to his chamber, and in private receive and decide upon the motion. This is not consistent with the genius of our legislation, nor with the course of our judicial proceedings. It would be much more consonant with both, that the power of the judge at his chambers should be suspended during his term, than that it should be exercised only in secret.

“Whatever motives might induce the legislature to withhold from the Supreme Court the power to award the great writ of *habeas corpus*, there could be none which could induce them to withhold it from every court in the United States; and as it is granted to *all* in the *same sentence*, and by the *same words*, the sound construction would seem to be, that the first sentence vests this power in all the courts of the United States; but as those courts are not always in session, the second sentence vests it in every justice or judge of the United States.

“The doubt which has been raised on this subject may be further explained by examining the character of the various writs of *habeas corpus*, and selecting those to which this general grant of power must be restricted, if taken in the limited sense of being merely used to enable the court to exercise its jurisdiction in causes which it is enabled to decide finally.

“The various writs of *habeas corpus* as stated and accurately defined by Judge Blackstone (3 Bl. Com., 129), are, 1st. The writ of *habeas corpus ad respondendum*, ‘when a man hath a cause of action against one who is confined by the process of some inferior court, in order to remove the prisoner, and charge him with this new action in the court above.’

“This case may occur when a party having a right to sue in this court (as a state at the time of the passage of this act, or a foreign minister) wishes to institute a suit against a person who is already confined by the process of an inferior court. This confinement may be either by the process of a court of the *United States*, or of a *state* court. If it be in a court of the United States, this writ would be inapplicable, because perfectly useless, and, consequently, could not be contemplated by the legislature. It would not be required, in such case, to bring the body of the defendant actually into court, as he would already be in the charge of the person who, under an original writ from this court, would

into the legality of the confinement of a person detained in prison by virtue of a judgment of a circuit court rendered in

be directed to take him into custody, and would already be confined in the same gaol in which he would be confined under the process of this court, if he should be unable to give bail.

“If the party should be confined by process from a state court, there are many additional reasons against the use of this writ in such a case.

“The state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this court, and in these cases the mode of proceeding is particularly prescribed, and is not by *habeas corpus*. They are not inferior courts, because they emanate from a different authority, and are the creatures of a distinct government.

“2d. The writ of *habeas corpus ad satisfaciendum*, ‘when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution.’

“This case can never occur in the courts of the United States. One court never awards execution on the judgment of another. Our whole judicial system forbids it.

“3d. *Ad prosequendum, testificandum, deliberandum*, &c., ‘which issue when it is necessary to remove a prisoner, in order to prosecute, or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed.’

“This writ might unquestionably be employed to bring up a prisoner to bear testimony in a court, consistently with the most limited construction of the words in the Act of Congress; but the power to bring a person up that he may be tried in the proper jurisdiction is understood to be the very question now before the court.

“4th and last. The common writ, *ad faciendum et recipiendum*, which issues out of any of the courts of Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into some superior court, commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated an *habeas corpus cum causa*), to *do and receive* whatever the king’s court shall consider in that behalf. This writ is grantable of common right, without any motion in court, and it instantly supersedes all proceedings in the court below.

“Can a solemn grant of power to a court to award a writ be considered as applicable to a case in which that writ, if issuable at all, issues by law without the leave of the court?

“It would not be difficult to demonstrate that the writ of *habeas*

a criminal prosecution. It was held that where the prisoner is detained by virtue of the judgment of a court which pos-

corpus cum causa cannot be the particular writ contemplated by the legislature in the section under consideration; but, it will be sufficient to observe generally, that the same act prescribes a different mode for bringing into the courts of the United States suits brought in a state court against a person having a right to claim the jurisdiction of the courts of the United States. He may, on his first appearance, file his petition, and authenticate the fact, upon which the cause is, *ipso facto*, removed into the courts of the United States.

"The only power, then, which on this limited construction would be granted by the section under consideration, would be that of issuing writs of *habeas corpus ad testificandum*. The section itself proves that this was not the intention of the legislature. It concludes with the following proviso, 'That writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.'

"This proviso extends to the whole section. It limits the powers previously granted to the courts, because it specifies a case in which it is particularly applicable to the use of the power by courts:—where the person is necessary to be brought into court to testify. That construction cannot be a fair one which would make the legislature except from the operation of a proviso, limiting the express grant of a power, the whole power intended to be granted.

"From this review of the extent of the power of awarding writs of *habeas corpus*, if the section be construed in its restricted sense; from a comparison of the nature of the writ which the courts of the United States would, on that view of the subject, be enabled to issue; from a comparison of the power so granted with other parts of the section, it is apparent that this limited sense of the term cannot be that which was contemplated by the legislature.

"But the 33d section throws much light upon this section. It contains these words: 'And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death; in which case it shall not be admitted *but by the supreme or a circuit court*, or by a justice of the Supreme Court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and of the usages of law.'

"The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed, is by the writ now applied for. Of consequence, a court possessing the power to bail prisoners not committed by itself, may award a writ of *habeas corpus* for the exercise of that power.

sesses general and final jurisdiction over the offence, such a judgment cannot be re-examined upon a writ of *habeas corpus*.

The clause under consideration obviously proceeds on the supposition that this power was previously given, and is explanatory of the 14th section.

"If, by the sound construction of the Act of Congress, the power to award writs of *habeas corpus* in order to examine into the cause of commitment is given to this court, it remains to inquire whether this be a case in which the writ ought to be granted.

"The only objection is, that the commitment has been by a court having power to commit and to bail.

"Against this objection, the argument from the bar has been so conclusive that nothing can be added to it.

"If, then, this were *res integra*, the court would decide in favor of the motion. But the question is considered as long since decided. The case of Hamilton is expressly in point in all its parts; and although the question of jurisdiction was not made at the bar, the case was several days under advisement, and this question could not have escaped the attention of the court. From that decision the court would not lightly depart. (United States v. Hamilton, 3 Dall. 17.)

"If the Act of Congress gives this court the power to award a writ of *habeas corpus* in the present case, it remains to inquire whether that act be compatible with the Constitution.

"In the *mandamus* case (ante, vol. 1, p. 175, *Marbury v. Madison*), it was decided that this court would not exercise original jurisdiction, except so far as that jurisdiction was given by the Constitution. But, so far as that case has distinguished between original and appellate jurisdiction, that which the court is now asked to exercise is clearly *appellate*. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail.

"It has been demonstrated at the bar, that the question brought forward on a *habeas corpus*, is always distinct from that which is involved in the cause itself. The question, whether the individual shall be imprisoned, is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and, therefore, these questions are separated, and may be decided in different courts.

"The decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature.

"But this point also is decided in Hamilton's case and in Burford's case.¹

"If, at any time, the public safety should require the suspension of

¹ At February Term, 1806, in this court.

The Supreme Court can inquire into the sufficiency of the cause of detention; but the judgment of a court of competent jurisdiction is a sufficient cause, especially where that judgment is by law withdrawn from the revision of the Supreme Court; and therefore, as the granting of the writ, in such a case, could be of no benefit to the party, it is not to be granted.¹ So, too, where a party is imprisoned for contempt, by order of a court of competent jurisdiction, the Supreme Court will not grant a writ of *habeas corpus*, for the order of commitment is in the nature of a final judgment, which the Supreme Court has no power to review; the return on the writ would show a sufficient cause for the imprisonment, and therefore it will not be granted.² But where the imprisonment is before judgment, the Supreme Court will grant a writ of *habeas corpus* to inquire into the sufficiency of the cause, and if the imprisonment is found to be irregular, will discharge the party.³

§ 205. The Supreme Court may also, by *habeas corpus*, admit a person to bail, committed by order of a circuit or district court, where the Supreme Court is authorized by statute to admit to bail, as in cases of crimes punished with death, under the thirty-third section of the Judiciary Act.⁴ But the Supreme Court has no power to issue a *habeas corpus*

the powers vested by this act in the courts of the United States, it is for the legislature to say so.

"That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws."

¹ Ex parte Tobias Watkins, 3 Peters, 193.

² Ex parte Kearney, 7 Wheaton, 38.

³ Ex parte Burford, 3 Cranch, 447. In this case, the prisoner was discharged, because the commitment did not state a *good cause certain, supported by oath*. So, too, in Bollman and Swartwout, *ut supr.*, where the prisoners were committed by order of the circuit court, on a charge of treason, the Supreme Court discharged them, because the offence of treason did not appear to have been committed.

⁴ The United States v. Hamilton, 3 Dallas, 13.

to revise a decision or order made by a judge of a circuit or district court at chambers.¹

§ 205 a. Neither the Supreme Court, nor any other court of the United States, has power to issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness, whether the process under which he is imprisoned be civil or criminal. Therefore, where a writ was applied for, to bring up a person confined by the sentence of a state court, in order that he might bring a writ of error to review the judgment of the state court, the application was refused.²

¹ In the Matter of Metzger, 5 Howard, 176.

² Ex parte Dorr, 3 Howard, 103.

CHAPTER III.

THE APPELLATE JURISDICTION OF THE SUPREME COURT OF
THE UNITED STATES, WITH REFERENCE TO THE CIRCUIT
COURT FOR THE DISTRICT OF COLUMBIA.

§ 206. THE final judgments, orders, and decrees of the Circuit Court for the District of Columbia, in which the matter in dispute is of the value of one thousand dollars and upwards, may be re-examined and reversed or affirmed in the Supreme Court, by writ of error or appeal, to be prosecuted in the same manner, under the same regulations, and with the same proceedings, as in the case of writs of error on judgments, or appeals upon orders or decrees rendered in the other circuit courts. Where the matter in dispute is of the value of \$100, and of less value than \$1,000, any justice of the Supreme Court may allow a writ of error, if he shall be of opinion that the question of law is of such extensive interest and importance as to render the final judgment of the Supreme Court desirable; and if the writ of error, when so granted, with the order of the judge thereon, is lodged in the clerk's office of the proper county, within thirty days after the end of the term at which the judgment has been rendered, it operates as a *supersedeas*.¹

§ 207. The Supreme Court has no jurisdiction of cases brought from the Circuit Court for the District of Columbia on a certificate of division of opinion of the judges;² or of

¹ Act of Feb. 27, 1801, ch. 15, § 8; Act of April 2, 1816, ch. 39, § 1, 2, 3; *The United States v. Hooe*, 1 Cranch, 318.

² *Ross v. Triplett*, 3 Wheat. 600.

writs of error to that court in criminal cases.¹ In all cases in which writs of error lie, the same rules are applicable in determining whether the amount in dispute appears to be within the jurisdiction, as in writs of error to the other circuit courts, except that the amount required is one thousand dollars.² The jurisdiction includes appeals from the Orphan's Court through the Circuit Court, where the matter in dispute exceeds the value of one thousand dollars.³ But the judgment or decree must be final. Where the Orphan's Court directed an issue to be sent for trial in the Circuit Court, which issue was "whether the petitioner was the widow of the deceased or not," and the Circuit Court proceeded to try the issue, and the jury, under the instructions of the court, found that the petitioner was not the widow, it was held that exceptions to these instructions could not be reviewed by the Supreme Court on a writ of error, the certificate of the finding of the jury, transmitted by the Circuit Court to the Orphan's Court not being such a final judgment, order, or decree as is contemplated by the statute, since the Orphan's Court would still have to pass a decree in order to settle the rights of the parties.⁴

¹ *The United States v. Moore*, 3 Cranch, 159.

² *Scott v. Lunt*, 6 Peters, 349.

³ *Nichols v. Hodges*, 1 Peters, 562.

⁴ *Van Ness v. Van Ness*, 6 Howard, 62.

CHAPTER IV.

THE APPELLATE JURISDICTION OF THE SUPREME COURT OF
THE UNITED STATES, WITH REFERENCE TO THE STATE
COURTS.

§ 208. FEW topics within the subject of this work are of more importance, and few involve more extensive inquiries, than the appellate jurisdiction of the Supreme Court of the United States exercised over the judgments of the state courts, by the operation of the 25th section of the Judiciary Act. The Constitution having extended the judicial power to all cases arising under the Constitution, laws, and treaties of the United States, it is obvious that there may, and must be, cases of this description, which can be reached by the judicial power of the Union only in the appellate form. These cases are those which originate in the state courts, but which involve the construction, operation, or effect of the Constitution, laws, or treaties of the United States. The judicial power of the United States is incapable of being extended to every case of this kind, in the form of original jurisdiction; for cases must arise in the state courts, of which they have a rightful original jurisdiction, and in which some provision of the Constitution, laws, or treaties of the United States may be drawn in question; and unless the judicial power of the United States could be extended to these cases in the appellate form, it would not reach them at all, and thus the provision of the Constitution, which extends the judicial power to all such cases, would fail to be executed, excepting as to those which originated in the courts of the United States.¹

¹ *Martin v. Hunter*, 1 Wheat. 304.

§ 209. The importance and necessity of preserving the paramount authority of the Constitution of the United States, and of all laws enacted or treaties entered into pursuant to its provisions and powers, and the equally great importance of a uniformity of decision upon all subjects within the purview of the Constitution, render it apparent that the appellate power of the national judiciary must be extended to some cases originating in the state courts. This can be done in two modes, both of which have been to some extent employed: namely, by removal of the cause from the state court in which it is pending, before final judgment, or by removing the record after final judgment has been rendered, by means of a writ of error, for the purpose of a revision of the grounds of the judgment, so far as they involve matter of law. It is with the latter that we are now concerned.

§ 210. This great object has been effected by means of the provisions of the 25th section of the Judiciary Act, which form a comprehensive and admirable system of great efficacy. Its purpose was to define the classes of cases, originating in state tribunals, to which the appellate power of the national judiciary should extend, by means of a writ of error, in order to preserve the supremacy and to secure the uniform construction of the Constitution, laws, and treaties of the United States. Without such definition, it is obvious that the appellate power granted by the Constitution to the national judiciary would have remained, as to all the cases arising under the Constitution, laws, or treaties of the United States, in state courts, a naked power, without exact and specific objects of its application; and without the provision of a writ of error, or some analogous mode of extending this power to its objects, it would have remained incapable of exercise. In examining this great statute, therefore, it should be kept in view, that its leading purpose was to define the objects to which the appellate power of the national judiciary over state tribunals is to attach. It was passed, not to create a power, but to provide the means of carrying into effect a pre-existing

power, by defining the objects to which it should attach, in one of the modes in which appellate power can be exercised, namely, by writ of error. Its constitutionality was formerly called in question, and the whole power of the national judiciary over the decisions of state tribunals was drawn into debate; but these fundamental questions were long since settled, and the repeated exercise of the power which this statute regulates has made it familiar to the country for more than sixty years.¹ The following are the terms of the statute:—

§ 211. “That a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision of the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had

¹ See *Martin v. Hunter*, 1 Wheaton, 304; *Cohens v. Virginia*, 6 Wheat. 264, for the decisions affirming the constitutionality of this statute, and the great reasons which led to its enactment.

been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision, as before provided, may, at their discretion, if the cause shall once have been remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute.”¹

§ 212. We are now to examine the several clauses of this statute, for the purpose of a full exposition of its various provisions. And the first provision which it makes is, that the judgment of the state court, which is to be reviewed by the Supreme Court of the United States on writ of error, must be a “final judgment or decree in the highest state court.” It would, doubtless, have been competent for Congress to have caused the appellate power of the national judiciary to be exercised at any stage of a proceeding in a state court, in which the validity or construction of the Constitution, laws, or treaties of the United States should be involved. That power is interposed in cases where the jurisdiction of the courts of the United States depends upon the character of the parties, and, in a few others, before final judgment, and as soon as the cause is pending, by removal; and the same provision might have been made with regard to that class of cases where the jurisdiction of the courts of the United States depends upon the questions involved. But, for reasons of practical convenience, the power has been directed to be exercised, in this class of cases, only after a final judgment or decree, and that, too, in the highest court of law or equity of the state in which a decision could be had in the particular case. In the first place, it is only

¹ Stat. at Large, 85, 86.

after a judgment or decree that disposes finally of a cause, that it can ordinarily be seen whether a question, of the particular character contemplated, arises or is involved in the merits of the controversy. The pleadings or the evidence may or may not develop such a question; but whether it enters into the real merits of the cause can generally be known only after a judgment has been rendered. In the second place, the statute looks to the final judgment or decree in the highest court of law or equity in the state, because it is not until such judgment or decree has been had in the highest court of the state, that it becomes certain that the judicial power of the state has put a wrong construction upon the Constitution, laws, or treaties of the United States, or has disregarded or overlooked their provisions.

§ 213. A judgment, reversing that of an inferior court, and awarding a *venire facias de novo*, is not a final judgment, in the sense of the statute;¹ and a decree of the highest court of equity of a state, affirming the decretal order of an inferior court refusing to dissolve an injunction granted on the filing of the bill, is not a final decree.² And, in general, where the cause is remanded to the inferior state court, in which it originated, for further proceedings, not inconsistent with the judgment of the highest court, the case cannot be brought by writ of error to the Supreme Court of the United States.³ But if the judgment or decree determines the particular cause, although the question may again be litigated between the same parties, it is final; and this

¹ *Houston v. Moore*, 3 Wheaton, 433. So, too, a judgment awarding a writ of restitution in an action of ejectment, where, in the execution of *hab. fac.* the sheriff had improperly turned a party out of possession, is not a final judgment, but rather it is the action of a court on its own process, which is submitted to its discretion. *Smith v. Trabue's heirs* 9 Peters, 4.

² *Gibbons v. Ogden*, 6 Wheaton, 448.

³ *Winn v. Jackson*, 12 Wheaton, 135; *Miners' Bank of Dubuque v. The United States*, 5 Howard, 213; *Pepper v. Dunlap*, 5 Howard, 51.

may be a judgment upon a writ of prohibition to an inferior court, since the term "suit," in the statute, is broad enough to cover any mode of proceeding by which the decision of a court of justice is sought to be obtained upon a right litigated between parties.¹ In the case of *Holmes v. Jennison*,

¹ *Weston v. The City Council of Charleston*, 2 Peters, 449, 462. In this case, Mr. Ch. Justice Marshall, delivering the opinion of the court, said: "In this case the city ordinance of Charleston is the exercise of an 'authority of the State of South Carolina,' 'the validity of which has been drawn in question, on the ground of its being repugnant to the Constitution,' and 'the decision is in favor of its validity.' The question, therefore, which was decided by the constitutional court is the very question on which the revising power of this tribunal is to be exercised, and the only inquiry is, whether it has been decided in a case described in the section which authorizes the writ of error that has been awarded. Is a writ of prohibition a suit?"

"The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit. The question between the parties is precisely the same as it would have been in a writ of replevin, or in an action of trespass. The constitutionality of the ordinance is contested, the party aggrieved by it applies to a court, and, at his suggestion, a writ of prohibition, the appropriate remedy, is issued. The opposite party appeals; and, in the highest court, the judgment is reversed, and judgment given for the defendant. This judgment was, we think, rendered in a suit.

"We think, also, that it was a final judgment in the sense in which that term is used in the twenty-fifth section of the Judicial Act. If it were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than Congress could have intended. Judgments in actions of ejectment, and decrees in chancery, dismissing a bill without prejudice, however deeply they might affect rights protected by the Constitution, laws, or treaties of the United States, would not be subject to the revision of this court. A prohibition might issue, restraining a collector from collecting duties, and this court could not revise and correct the judgment. The word 'final' must be

the question arose, whether the refusal of the Supreme Court of the State of Vermont to discharge a prisoner upon habeas corpus, who was confined under a warrant issued by the governor of the state, for the purpose of having him delivered up to the authorities of Canada as a fugitive from justice, was a final judgment in a suit. The court were divided upon the point, whether the judgment brought up by the writ of error disclosed such a case as is contemplated by the statute, but were agreed upon the point that the refusal to discharge a prisoner on habeas corpus is a final judgment in a suit.¹

understood in the section under consideration, as applying to all judgments and decrees which determine the particular cause."

See also *Columbian Ins. Co. v. Wheelright*, 7 Wheat. 434; *Kendall v. The United States*, 12 Peters, 544.

¹ *Holmes v. Jennison*, 14 Peters, 540. In this case, Mr. Ch. Justice Taney, delivering the opinion of himself, Mr. Justice Story, Mr. Justice McLean, and Mr. Justice Wayne, said: "Before, however, we proceed to refer more particularly to the decisions heretofore given, it is proper to remark, that there is no material difference between the language of the law giving the writ of error from the judgment of the Circuit Court for the District of Columbia, and the language used in the twenty-second and twenty-fifth sections of the Act of 1789, so far as relates to the forms of proceeding and the nature of the judgment. Undoubtedly, there are a multitude of cases in which a writ of error will lie from the judgment of a circuit court, where it would not lie to this court from a judgment rendered in a similar controversy in a state court. But our present inquiry has nothing to do with that distinction. We are speaking merely of the nature of the proceeding in this case, and examining whether it is of that description, that, under the twenty-fifth section of the Act of 1789, will authorize a writ of error. The writ in that section is given from any 'final judgment' 'in a suit.' In the Act relating to the District of Columbia, it is given from 'any final judgment.' In the twenty-second section of the Act of 1789, it is given from 'final judgments' 'in civil actions.' These different forms of expression have always been held to mean the same thing; and, consequently, the decision of this court upon one of them is equally applicable to the others. With this explanation, we proceed to inquire whether the habeas corpus was 'a suit.' We have already shown that in these proceedings an authority exercised under a state was drawn in question; that the decision was in

§ 214. But in order to bring a case within the statute, some one or more of the questions described in the statute,

favor of the authority; and that the judgment of the court was final. The remaining question is, were these things done in a suit?

"The first case in which this question appears to have arisen, was that of the *Columbian Insurance Company v. Wheelright and others*, 7 Wheat. 534. The Circuit Court for the District of Columbia had in that case awarded a peremptory mandamus, to admit the defendants to the office of directors in the said Insurance Company. The Company, thereupon, brought a writ of error to the Supreme Court, and the question whether a writ of error would lie, from the order of a court awarding a peremptory mandamus, was directly presented. It was argued by counsel, and decided by the court, and it was ruled that the writ of error would lie. It is true that this case was decided under the Act of Congress relating to the District of Columbia. But, in delivering the opinion, the court remark, that the law relating to the district, under which that case arose, was 'similar in its provisions with the Judiciary Act of 1789, ch. 20, sec. 22.' The decision, therefore, in that case was, in effect, a decision upon the construction of the Act of 1789.

"The same interpretation was again given to this Act of Congress in the case of *Kendall v. The United States*, 12 Peters, 524. The question of jurisdiction was in that case most fully and deliberately considered by the court. The English and American cases on the subject were carefully examined and discussed; and all of the objections taken in the English books, and arising from the summary form of the proceeding, and the nature of the decision, were brought forward and considered by the court. But the case of the *Columbian Insurance Company v. Wheelright and others*, was supposed to have settled the question; and the jurisdiction was sustained. There was no written opinion by the court on this point; but the case is a recent one, and the circumstances above mentioned are yet fresh in the recollection of the members of the court. After these two decisions, whatever may be regarded as the doctrines of the English courts in such cases, the question whether a writ of error will lie under the twenty-second section of the Act of 1789, from the judgment of a court awarding a peremptory mandamus, can hardly be considered as open for discussion in this court. We have already mentioned, that a writ of error under the twenty-fifth section, so far as it depends on the forms of proceeding and the nature of the judgment, must be governed by the same rules that apply to similar writs under the twenty-second section, and under the Act relating to the District of Columbia. But the case of *Weston and Others v. The City Council of Charleston*, 2 Peters, 419, which has already been referred to, arose on the twenty-fifth section itself, and appears to us decisive of the point in

which give the Supreme Court of the United States jurisdiction, must be actually raised and actually decided in the

question. In that case, a prohibition had been obtained by the plaintiffs in error from the Court of Common Pleas of South Carolina, for the Charleston District, to restrain the City Council of Charleston from levying a tax upon the stock of the United States, held by residents of the city. The City Council removed the case by writ of error to the Constitutional Court, the highest court of law in the state, where the decision of the Court of Common Pleas was reversed; and the ordinance imposing the tax held not to be repugnant to the Constitution of the United States. From this decision a writ of error was brought to this court, and the question was raised here, whether a prohibition was a suit within the meaning of the Act of 1789. The court held that it was; and Chief Justice Marshall, in delivering the opinion of the court, says, 'Is a writ of prohibition a suit? The term is certainly a very comprehensive one; and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various; but if a right is litigated between the parties in a court of justice, the proceeding by which the decision of the court is sought is a suit.'

"We entirely concur in the definition thus given of the meaning of the word 'suit,' as used in the Act of 1789. It makes the Act of Congress consistent with the principles of justice, and interprets it according to the natural meaning of its words; and it is too plain for argument, that according to this definition, the proceeding upon the habeas corpus was a suit in the Supreme Court of Vermont. A right claimed by the prisoner, Holmes, under the Constitution of the United States, was litigated between him and the governor of the state and the sheriff of the county, in a court of justice. The proceeding by habeas corpus, by which the decision of the court was sought, was, in the language of the case referred to, a suit; and we cannot, therefore, refuse to take jurisdiction upon this writ of error, without disregarding the deliberate decisions of this court.

"It is very true that neither the case just mentioned, nor the cases before referred to, were writs of error upon a refusal to discharge on habeas corpus. But in the English cases, the authorities are stronger in favor of the writ of error in the case of the habeas corpus, than in the case of the mandamus. The House of Lords affirmed the judgment of the Court of King's Bench, which decided that a writ of error would not lie to that court, from the judgment of the Court of King's Bench in Ireland, awarding a peremptory mandamus. But the House of Lords, which is the highest judicial tribunal in England, have never, by any decision, countenanced the idea, that a writ of error would not lie from the refusal of the Court of King's Bench to discharge a party on habeas corpus.

highest court of law or equity of the state; and, therefore, where the highest court of the state affirms a judgment of the court below, because no transcript of the record was filed in the appellate court, such affirmance is not a case for a writ of error under the statute.¹ When, however, there has

On the contrary, in the Aylesbury case, before mentioned, they decided that a writ of error ought to be issued to bring the question before them. The Commons, indeed, vehemently denied that the writ would lie, but it will be remembered that the Aylesbury men had been imprisoned by the House of Commons for a breach of privilege; and that House was naturally excited by a proceeding which would have made the House of Lords, in a great measure, the judges of the privileges of the Commons. It is not in heated conflicts of this description between two legislative bodies concerning their respective privileges, that we are to look for calm and precise judgments on questions of law; and neither the opinion of the Lords nor the Commons, expressed under such circumstances, ought to be esteemed as safe guides in a court of justice. It is certain, however, that the question whether a writ of error would lie in such a case, was then an open one, upon which the two Houses differed in opinion. In New York, in the case of *Yates v. The People*, before mentioned, it was decided in the Court for the Correction of Errors, that a writ of error would lie from the refusal of the Supreme Court of the state to discharge a party on habeas corpus. There was, indeed, great division of opinion in the court, and so many eminent and distinguished judges dissented from the judgment given, that we do not feel authorized to refer to it as having settled that question in New York. Yet that case, as well as the English cases, show that the point has been a doubtful one, and that the right to the writ of error in the case of the habeas corpus has always stood on firmer and better ground than in the case of the mandamus. And we refer to these cases to show, among other things, that the Supreme Court, in the decisions before mentioned, have not overturned established principles; that they have merely settled doubtful questions, and have not settled them against the weight of judicial authority; and as the construction they have given to the word suit, in the Act of 1789, is well calculated to promote the great ends of justice, and undoubtedly conforms to the intention of the legislature, we perceive no sufficient reason for setting it aside, or departing from it. Under the authority of these decisions, therefore, we hold that the judgment of the Vermont court, now before us, was a final judgment in a suit; and the plaintiff in error is, therefore, entitled to have it re-examined in this court by writ of error."

¹ *Matheson v. The Branch of the Bank of the State of Alabama at Mobile*, 7 Howard, 260.

been a final judgment of the highest court of the state having cognizance of the case, the record of that judgment may be brought from any court in which it is legally deposited, and in which it may be found by the writ of error. This point was decided in *Gelston v. Hoyt*,¹ in which case, Mr. Justice Story, delivering the opinion of the court, said:—

“It is contended that the record is not and cannot be brought before this court.

“²By the judicial system of the State of New York, the decisions of their Supreme Court are revised and corrected in a court of errors, after which the record is returned to the Supreme Court, where the judgment as corrected is entered, and where the record remains. In this case the writ of error was received by the Court of Errors, after the record had been transmitted to the Supreme Court, whose judgment was affirmed.

“It is contended that, the record being no longer in the court of last resort in the state, can, by no process, be removed into this court.

“The Judiciary Act allows the party who thinks himself aggrieved by the decision of any inferior court, five years, within which he may sue out his writ of error, and bring his cause into this court. The same rule applies to judgments and decrees of a state court, in cases within the jurisdiction of this court. As the constitutional jurisdiction of the courts of the Union cannot be affected by any regulation which a state may make of its own judicial system, the only inquiry will be, whether the Judiciary Act has been so framed as to embrace this case.

“The words of the act are, ‘that a final judgment or decree in any suit in the highest court of law or equity of a state in which a decision could be had, where is drawn in question,’ &c., ‘may be re-examined and revised, or affirmed

¹ 3 Wheaton, 246, 302.

² “Under the 25th section of the Judiciary Act of 1789, ch. 20, the writ of error from this court may be directed to any state court in which the record and judgment may be found.”

in the Supreme Court of the United States upon a writ of error, the citation being signed,' &c. The act does not prescribe the tribunal to which the writ of error shall be directed. It must be directed either to that tribunal which can execute it; to that in which the record and judgment to be examined are deposited, or to that whose judgment is to be examined, although from its structure it may have been rendered incapable of performing the act required by the writ. Since the law requires a thing to be done, and gives the writ of error as the means by which it is to be done, without prescribing in this particular the manner in which the writ is to be used, it appears to the court to be perfectly clear that the writ must be so used as to effect the object. It may then be directed to either court in which the record and judgment on which it is to act may be found. The judgment to be examined must be that of the highest court of the state having cognizance of the case, but the record of that judgment may be brought from any court in which it may be legally deposited, and in which it may be found by the writ."

§ 215. It is not necessary that a writ of error issued under the 25th section of the Judiciary Act should state that it is directed to a final judgment of the state court, or that the court is the highest court of law or equity of the state. The writ of error is the act of the court; its object is to cite the parties to the Supreme Court of the United States, and to bring up the record. If it has issued improvidently, it may be quashed or dismissed on motion.¹

§ 216. We may now proceed to consider what the record, when brought up by writ of error from a state court, must disclose, in order to give jurisdiction to the Supreme Court of the United States. This involves an inquiry into the questions which the statute makes the foundation of juris-

¹ *Buel v. Van Ness*, 8 Wheaton, 312, 320. The writ may be issued by the clerk of a circuit court, under the seal of the court, in the form prescribed by the Act of May 8, 1792, c. 137, § 9. *Ibid.*

diction, the mode in which those questions must appear to have been dealt with by the state court, and the extent to which both the questions decided, and the decision itself, must be disclosed by the record.

§ 217. The questions embraced in the statute are the validity of a treaty or statute of the United States, or an authority exercised under the United States; the validity of a statute of, or an authority exercised under, any state, on the ground of an alleged repugnancy to the Constitution, or a law or treaty of the United States; and the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States.

§ 218. These questions, however, are not to be separated from the decision; for it is only when the cause is decided in a particular manner, notwithstanding the question contemplated by the statute may have been raised, that a writ of error will lie. For example, if the validity of a treaty or statute of, or authority exercised under, the United States, is drawn in question in a state court, in order to admit of a writ of error, the decision of the state court must be against their validity; if the validity of a statute of, or authority exercised under, any state, is drawn in question on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, the decision must be in favor of their validity; and if the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, is drawn in question, the decision must be against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the Constitution, treaty, statute, or commission.

§ 219. In order to bring a case within the provisions of the statute, it is necessary that two things should appear by the record: 1st, that some one of the questions contained in the statute did arise in the state court; and 2d, that the

question was decided by the state court, as the statute requires. It is not necessary that the question should appear on the record to have been raised, and the decision made, in direct and positive terms, *ipsissimis verbis*; but it is sufficient, if it appears by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to have induced the judgment. It is not sufficient to show that a question might have arisen or been applicable to the case, unless it is farther shown, on the record, that it did arise, and was applied by the state court to the case.¹ The phrase used in the statute is "drawn in

¹ *Crowell v. Randall*, 10 Peters, 368. In this case, Mr. Justice Story, delivering the opinion of the court, thus reviewed the previous cases in relation to these points:—

"In the interpretation of this section of the Act of 1789, it has been uniformly held, that to give this court appellate jurisdiction, two things should have occurred and be apparent in the record: first, that some one of the questions stated in the section did arise in the court below; secondly, that a decision was actually made thereon by the same court, in the manner required by the section. If both of these do not appear on the record, the appellate jurisdiction fails. It is not sufficient to show that such a question might have occurred, or such a decision might have been made in the court below. It must be demonstrable that they did exist, and were made. The principal, and perhaps the only important difficulty which has ever been felt by the court, has been in ascertaining in particular cases, whether these matters (the question and decision) were apparent on the record. And here the doctrine of the court has been, that it is not indispensable that it should appear on the record, in *totidem verbis*, or by direct and positive statement, that the question was made and the decision given by the court below on the very point; but that it is sufficient, if it is clear from the facts stated, by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question, as indispensable to that judgment.

"Although this has been the course of the decisions in this court, as to the extent and exercise of its appellate jurisdiction over the judgments and decrees of state courts, yet it is apparent, from the arguments on the present occasion, as well as from those which have been addressed to us on several other late occasions, that a different impression exists at the bar, and that it has been supposed, that a much wider latitude of interpretation of the twenty-fifth section of the Judiciary Act of 1789 had

question;" and the meaning of this is, that the validity of a law or treaty of the United States, or the validity of a state

been adopted by the court. To correct, at least, as far as in us lies, this mistaken notion, we shall now proceed to review the various decisions which have heretofore been made on this subject.

"The earliest case is *Owings v. Norwood's Lessee*, 5 Cranch, 344. In that case it clearly appeared that the construction of a treaty was before the state court, and that it was decided, that the right of the party was not protected by the treaty. This court affirmed the decision of the state court. The next case was *Smith v. The State of Maryland*, 6 Cranch's Rep. 281. In that case it was contended that the court had no jurisdiction, because the cause turned exclusively upon the confiscation laws of Maryland; and that no question relative to the construction of the treaty of peace, did or could occur. But upon the facts stated on the record, the only title asserted by the original plaintiffs was founded on the confiscation acts of Maryland; and the only title set up by the original defendant was for a British alien, protected by the treaty of peace. If that title was so protected, then the plaintiffs were not entitled to the relief sought by the bill; if otherwise, then the plaintiffs were entitled to a decree. The state court decided that the plaintiffs were so entitled; and, therefore, necessarily decided against the treaty as a protection. The jurisdiction was maintained by this court upon this posture of the facts; and the decision of the state court was afterwards affirmed. But the court said, that in order to decide upon the main question, it was indispensable to ascertain what the nature of the title was to which the treaty was sought to be applied.

"The next case was *Martin v. Hunter's Lessee*, 1 Wheaton's Rep. 305, 355. There the original case came before the court upon an agreed statement of facts, upon which the state court gave judgment against the original defendant. That judgment was upon a writ of error reversed by this court; and when the case came afterwards before this court upon a second writ of error, the objection was again, that the original case was not within the twenty-fifth section of the Judiciary Act. Upon this occasion, the court, after stating the material facts in the agreed case, said: 'It is apparent from this summary explanation, that the title, thus set up by the plaintiff, might be open to other objections; but the title of the defendant in error (against which the state court have decided) was perfect and complete, if it was protected by the Treaty of 1783. If, therefore, this court had authority to examine into the whole record, and to decide upon the legal validity of the title of the defendant, as well as its application to the treaty of peace, it would be a case within the express purview of the twenty-fifth section of the act; for there was nothing in the record upon which the court below could have decided

law, or authority, on the ground of its repugnancy to the Constitution, treaties, or laws of the United States, or the

but upon the title, as connected with the treaty. And if the title was otherwise good, its sufficiency must have depended altogether upon its protection under the treaty. Under such circumstances it was strictly a suit, where was drawn in question the construction of a treaty, and the decision was against the title specially set up or claimed by the defendants. It would then fall within the very terms of the act.'

"The next case was *Inglee v. Coolidge*, 2 Wheat. 315; 4 Cond. Rep. 465. Mr. Chief Justice Marshall, in delivering the opinion of the court, said: 'It does not appear from the record that either the constitutionality of the law of Pennsylvania, or any Act of Congress was drawn in question. It would not be required that the record should, in terms, state a misconstruction of an Act of Congress, or that an Act of Congress was drawn in question. It would have been sufficient to give this court jurisdiction of the cause, that the record should show that an Act of Congress was applicable to the case. This is not shown by the record.' The language used in this last sentence has been often cited, as if it imported that if an Act of Congress was shown to be applicable to the case, although it was not in fact applied by the decision of the state court, it would sustain the appellate jurisdiction of this court. That was certainly not the understanding of the Chief Justice, or of the court. The case of *Miller v. Nicholls* was decided in the state court upon an agreed statement of facts; by which it appeared that Nicholls was a debtor both to the United States and to the State of Pennsylvania; and the question raised was, whether the United States or the State of Pennsylvania was entitled to certain money of Nicholls, then in court, as the creditor of Nicholls. The United States claimed it in virtue of the priority given by the Act of the 3d of March, 1797, ch. 74. But it did not appear in the statement of facts that Nicholls was then in a state of insolvency; and if he was not, then the priority of the United States did not attach; or, in other words, the Act of Congress was not applicable to it. It is to this state of the facts that the language of the Chief Justice was addressed. He added, 'had the fact of insolvency appeared upon the record, that would have enabled this court to revise the judgment of the Supreme Court of Pennsylvania.' And why? it may be asked. Because, upon the statement of facts, the state court must, under these circumstances, have misconstrued the Act of Congress, or disregarded it; for otherwise they would not have given the judgment which is sought to be revised. That this is the true explanation of the case does not admit of controversy. In the very next case, *Williams v. Norris*, 12 Wheat. 117, 124; 6 Cond. Rep. 462, where this very expression, in *Miller v. Nicholls*, was relied on in argument to establish the

validity of an authority exercised under the United States, or the construction of a clause of the Constitution, or of a

position that it is sufficient to give the court jurisdiction, that the record should show that an Act of Congress was applicable to the case, the Chief Justice gave the very explanation of it which is now insisted on; and he added, 'had the record shown that this was a case of insolvency, so that the Act of Congress applied to it, that act must have been misconstrued, or its obligation denied, when the court decreed the money to Pennsylvania; and the court were of opinion that the act could not be evaded by the omission to refer to it in the judgment, or to spread it on the record.' In the case of *Williams v. Norris*, this court dismissed the writ of error, because it was not stated on the record that the constitutionality of the Act of Tennessee, set up in that case, was drawn in question. In *Fisher v. Cockerill*, 5 Peters' Rep. 258, the case of *Miller v. Nicholls* was again cited and commented on by the Chief Justice, and the same explanation of the decision was recognised and enforced; and, because the facts did not appear on the record, which would bring the case within the terms of the twenty-fifth section of the Act of 1789, the writ of error, in *Fisher v. Cockerill*, was also dismissed.

"But to proceed with the other cases in their chronological order. The next case was *Hickie v. Starke*, 1 Peters' Rep. 98. There a motion was made to dismiss the writ of error for the want of jurisdiction. Mr. Chief Justice Marshall, in delivering the opinion of the court dismissing the writ of error, said: 'In the construction of that section (the twenty-fifth) the court has never required that the treaty or Act of Congress, under which the party claims who brings the final judgment of a state court into review before this court, should have been pleaded specially, or spread on the record. But it has always been deemed essential to the exercise of jurisdiction in such a case, that the record should show a complete title under the treaty or Act of Congress, and that the judgment of the court is in violation of that treaty.'

"The next case was *Wilson v. The Black Bird Creek Marsh Company*, 2 Peters' Rep. 245, 250. In that case, the Chief Justice, in delivering the opinion of the court sustaining the jurisdiction, said: 'We think it impossible to doubt that the constitutionality of the act (of Delaware) was the question, and the only question, which could have been discussed in the state court. That question must have been discussed and decided. This court has repeatedly decided in favor of its jurisdiction in such a case. *Martin v. Hunter's Lessee*, *Miller v. Nicholls*, and *Williams v. Norris*, are expressly in point. They establish, as far as precedents can establish anything, that it is not necessary to state in terms on the record, that the Constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the pro-

treaty, or statute of, or commission held under the United States, was a question that must have arisen in the case,

visions of the twenty-fifth section of the Judicial Act, if the record shows that the Constitution, or a law, or a treaty of the United States, must have been misconstrued, or the decision could not have been made; or, as in this case, that the constitutionality of a state law was questioned, and the decision was in favor of the party claiming under such law.'

"The next case was *Satterlee v. Mathewson*, 2 Peters' Rep. 380, 410, where Mr. Justice Washington, in delivering the opinion of the court sustaining the jurisdiction, after citing prior cases, said: 'If it sufficiently appear from the record itself that the repugnancy of a statute of a state to the Constitution of the United States was drawn into question, or that that question was applicable to the case, this court has jurisdiction of the cause under the section of the act referred to, although the record should not in terms state a misconstruction of the Constitution of the United States, or that the repugnance of the statute of the state to any part of that Constitution was drawn into question.' But he immediately adds, as explanatory of his remarks, and to correct their generality, 'Now, it is manifest from this record, not only that the constitutionality of the statute of the 8th of April, 1826, was drawn into question, and was applicable to the case, but that it was so applied by the judge, and formed the basis of his opinion to the jury, that they should find in favor of the plaintiff, if in other respects she was entitled to a verdict. It is equally manifest that the right of the plaintiff to recover in that action depended on that statute.'

"The next case was *Harris v. Dennie*, 3 Peters' Rep. 292, 302, where the court, in answer to the objection of a want of jurisdiction, because it did not appear upon the record that any question within the twenty-fifth section arose in the state court upon the special verdict, said: 'It has been often decided in this court, that it is not necessary that it should appear, in terms, upon the record, that any such question was made. It is sufficient if from the facts stated such a question must have arisen, and the judgment of the state court would not have been what it is, if there had not been a misconstruction of some Act of Congress, or a decision against the validity of the right, title, privilege, or exemption set up under it.'

"The next case was *Craig v. The State of Missouri*, 4 Peters' Rep. 410, in which Mr. Chief Justice Marshall, in affirming the jurisdiction of the court, said: 'To give jurisdiction to this court, it must appear in the record. 1. That the validity of a statute of the State of Missouri was drawn in question, on the ground of its being repugnant to the Constitution of the United States; 2. That the decision was in favor of its validity.' And again: 'There has been a perfect uniformity in the

because it was necessary to the decision. The facts may show this, as well as if the record recited it. It is not

construction given by this court to the twenty-fifth section of the Judicial Act. That construction is, that it is not necessary to state in terms in the record, that the Constitution, or a treaty or law of the United States, has been drawn in question, or the validity of a state law on the ground of its repugnance to the Constitution. It is sufficient if the record shows, that the Constitution, or a treaty or law of the United States might have been construed, or that the constitutionality of a state law must have been questioned, and the decision has been in favor of the party claiming under such law.'

"In *Fisher v. Cockerell*, 5 Peters' Rep. 255, the cases of *Harris v. Dennil*, and *Craig v. The State of Missouri*, were reviewed, and the doctrine stated therein confirmed; and Mr. Chief Justice Marshall, after that review, added, 'We say, with confidence, that this court has never taken jurisdiction unless the case, as stated in the record, was brought within the provisions of the 25th section of the Judicial Act.'

"In *Davis v. Packard*, 6 Peters' Rep. 41, 48, Mr. Justice Thompson said, 'It has also been settled, that in order to give jurisdiction to this court under the 25th section of the Judiciary Act, it is not necessary that the record should state in terms, that an Act of Congress was in point of fact drawn in question. It is sufficient, if it appears from the record, that an Act of Congress was applicable to the case, and was misconstrued; or the decision in the state court was against the privilege or exemption specially set up under such statute.'

"In *The Mayor of the City of New Orleans v. De Armas*, 9 Peters' Rep. 234, where the suit was dismissed for want of jurisdiction, the Chief Justice, in delivering the opinion of the court, said, 'We can inquire only whether the record shows, that the Constitution, or a treaty, or a law of the United States has been violated by the decision of the state court. To sustain the jurisdiction of the court in the case now under consideration, it must be shown, that the title set up by the city of New Orleans is protected by the treaty ceding Louisiana to the United States, or by some Act of Congress applicable to that title.'

"These are all the cases, it is believed, in which the construction of the 25th section of the Judiciary Act has been made a matter of controversy; and they extend over a period of more than twenty-five years. They exhibit a uniformity of interpretation of that section which has never been broken in upon. They establish, so far as a course of decision can establish, the propositions already stated in the early part of this opinion. The period seems now to have arrived in which the court should, upon a full review of all the cases, with a view to close, if possible, all future controversy on the point, re-affirm the interpretation

necessary that the record should show that such a question was made; it is sufficient if it states facts from which it appears that such a question must have arisen, and the judgment of the state court would not have been what it is, if there had not been a misconstruction or disregard of some Act of Congress, or treaty, or provision of the Constitution,

which they have constantly maintained. It is, that to bring a case within the 25th section of the Judiciary Act, it must appear on the face of the record, 1st, That some one of the questions stated in that section did arise in the state court. 2d, That the question was decided by the state court, as required in the same section. 3d, That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms, *ipsissimis verbis*; but that it is sufficient if it appears by clear and necessary intendment, that the question must have been raised, and must have been decided in order to have induced the judgment. 4th, That it is not sufficient to show, that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the state court to the case.

"If, with these principles in view, we examine the record before us, it is very clear that this court has no appellate jurisdiction. No question appears to be raised, or decision made, by the state court within the purview of the twenty-fifth section. The statement of facts, upon which the judgment against the garnishee (the plaintiff in error) was given, presents no question as to the constitutionality of the laws of Delaware relative to garnishees; and no right is set up by the Chesapeake and Delaware Canal Company, under their charter, which has been infringed, in violation of the Constitution of the United States. So far as we can perceive from the record, the judgment had no reference to any constitutional question whatsoever; but it proceeded upon general principles of law, applicable to cases of garnishment. If, indeed, we were compelled to draw any conclusion, it would be that judgment proceeded upon the ground stated at the bar, that the payment of the tolls, for which the plaintiff was held liable as garnishee, was a meditated fraud upon the garnishee laws of Delaware, and a violation of the charter and by-laws of the Company. But it is unnecessary for us to draw any such conclusion, since there is a total absence from the record of any question and decision which would give this court jurisdiction."

See, also, *Armstrong v. The Treasurer of Athens County*, 16 Peters, 281; *Commercial Bank of Cincinnati v. Buckingham's Executors*, 5 Howard, 317; *Smith v. Hunter*, 7 Howard, 738; *Neilson v. Lagou*, 12 Howard, 98.

or of some authority or privilege secured by them. If the record shows that an Act of Congress, a treaty, or a provision of the Constitution was applicable to the case, then it was "drawn in question," provided the decision of the state court was made in the manner required by the statute.¹ But if the record does not enable the Supreme Court to see that the state court must have misconstrued or disregarded an Act of Congress, or a treaty, or a provision of the Constitution, in making its judgment, the Supreme Court cannot entertain jurisdiction.²

§ 220. The cases establish very clearly these distinctions. The case of *Miller v. Nichols* was a claim filed by the Attorney of the United States, for a sum of money brought into a state court of Pennsylvania, to be disposed of by the court. The money belonged to a debtor of the United States, who was also indebted to the State of Pennsylvania. The court decreed the money to the state, in pursuance, probably, of an act of the legislature, giving the state a preference. The case was carried by writ of error to the Supreme Court of the United States, upon the allegation that the judgment was in violation of the Act of Congress, which gives priority to the United States in all cases of insolvency. The fact of insolvency did not appear upon the record, and, therefore, it could not appear that the Act of Congress was applicable to the case. If this fact had appeared, then it would have been apparent that the state court must have misconstrued it, or denied its obligation, when it decreed the money to the state, although it might not have been referred to in the judgment, or spread upon the record.³

¹ *Miller v. Nichols*, 4 Wheaton, 311; *Williams v. Norris*, 12 Wheaton, 117; *Harris v. Dennie*, 3 Peters, 292, 301; *Wilson v. The Black Bird Creek Marsh Company*, 2 Peters, 245.

² *Ibid.*

³ *Miller v. Nichols*, 4 Wheaton, 311. See this case commented on and explained in *Williams v. Norris*, 12 Wheaton, 124, 125.

§ 220 a. So, too, where the ground of the writ of error was that the title of the defendant in error depended upon an act passed in his favor by the legislature of Tennessee, and that this act was repugnant to the Constitution of the United States, but the record did not state that the constitutionality of the act was drawn in question, it was held that it was necessary the record should show that the title of the party depended upon the act passed in his favor, otherwise the question of its constitutionality could not appear to have been involved.¹ But, where it clearly appeared from the record, that the title of the party depended upon a treaty, and there was nothing in the record upon which the state court could have decided but upon the title as connected with the treaty, it was held that the treaty was "drawn in question."² So, also, where the record exhibited a plea in the state court, which denied the competency of an act of a state legislature to authorize the construction of a dam across a navigable stream, in which the tide ebbed and flowed, and where there was a public highway, it was held that the constitutionality of the act, on the ground of its being repugnant to the Constitution of the United States, was "drawn in question," although the record did not state so in terms, because it necessarily arose in the pleadings, and must have been determined.³

¹ *Williams v. Norris*, 12 Wheaton, 117, 124.

² *Martin v. Hunter*, 1 Wheaton, 304, 305.

³ *Wilson v. The Black Bird Creek Marsh Company*, 2 Peters, 245, 249. In this case, Mr. Ch. Justice Marshall, delivering the opinion of the court, said: "The defendants in error deny the jurisdiction of this court, because, they say, the record does not show that the constitutionality of the act of the legislature, under which the plaintiff claimed to support his action, was drawn into question."

"Undoubtedly, the plea might have stated in terms, that the act, so far as it authorized a dam across the creek, was repugnant to the Constitution of the United States; and it might have been safer, it might have avoided any question respecting jurisdiction, so to frame it. But we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court. That question might have been discussed and decided."

"The plaintiffs sustain their right to build a dam across the creek by

§ 221. In like manner, where the record shows that the plaintiff in error had brought a writ of error in the Court of Errors of the State of New York, and had assigned for error that he was Consul-General of the King of Saxony, and thereby privileged from being sued in a state court, according to the Constitution and laws of the United States, it was held that the Court of Errors, in giving judgment against him, must have decided against the exemption set up and claimed under a law of the United States.¹ But where the record did not show that the title of the plaintiff in error was derived from the laws of Virginia, which would have brought it within the compact between that state and the State of Kentucky, and would have shown that the law of Kentucky, on which the opinion of the court below was founded, was repugnant to that compact, and, therefore,

the Act of Assembly. Their declaration is founded upon that act. The injury of which they complain, is to a right given by it. They do not claim for themselves any right independent of it. They rely entirely upon the Act of Assembly.

“The plea does not controvert the existence of the act, but denies its capacity to authorize the construction of a dam across a navigable stream, in which the tide ebbs and flows; and in which there was, and of right ought to have been, a certain common and public way in the nature of a highway. This plea draws nothing into question but the validity of the act, and the judgment of the court must have been in favor of its validity. Its consistency with, or repugnancy to, the Constitution of the United States, necessarily arises upon these pleadings, and must have been determined. This court has repeatedly decided in favor of its jurisdiction in such a case. *Martin v. Hunter's Lessee*, 1 Wheaton, 355; *Miller v. Nicholls*, 4 Wheaton, 311; and *William v. Norris*, 12 Wheaton, 117, are expressly in point. They establish, as far as precedents can establish anything, that it is not necessary to state in terms on the record, that the Constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the twenty-fifth section of the Judicial Act, if the record shows that the Constitution, or a treaty, or a law of the United States must have been misconstrued, or the decision could not be made. Or, as in this case, that the constitutionality of a state law was questioned, and the decision has been in favor of the party claiming under such law.”

¹ *Davis v. Packard*, 6 Peters, 41.

repugnant to the Constitution of the United States, it was held that the question, whether the law of Kentucky contravened the compact with Virginia, did not appear to have arisen.¹

¹ Lessor of *Fisher v. Cockerell*, 5 Peters, 248, 258. In this case, Mr. Ch. Justice Marshall, delivering the opinion of the court, said: "If the view which has been taken of the record be correct, it does not show that the compact with Virginia was involved in the case. Consequently, the question, whether the Act for the benefit of occupying claimants was valid or not, does not appear to have arisen; and nothing is shown on the record which can give jurisdiction to this court. The counsel for the plaintiff in error has referred to former decisions of this court, laying down the general principle, that the title, under a treaty or law of the United States, need not be specially pleaded; that it need not be stated on the record that a construction has been put on a treaty or law which this court may deem erroneous; or that an unconstitutional statute of a state has been held to be constitutional. It is sufficient, if the record shows that misconstruction must have taken place, or the decision could not have been made. *Harris v. Dennie*, 3 Peters, 292, is a strong case to this effect. That case recognises the principle on which the plaintiff in error relies, and says, 'It is sufficient if, from the facts stated, such a question must have arisen, and the judgment of the state court would not have been what it is, if there had not been a misconstruction from some Act of Congress,' &c. &c. &c. But this misconstruction must appear from the facts stated, and those facts can be stated only on the record.

"In the case of *Harris v. Dennie*, a special verdict was found, and the court confined itself to a consideration of the facts stated in that verdict. Goods, in the custody of the United States, until the duties should be secured, and a permit granted for their being landed, were attached by a state officer at the suit of a private creditor. This fact was found in the special verdict, and the state court sustained the attachment. This court reviewed the Act of Congress for regulating the collection of duties on imports and tonnage, and came to the opinion 'that the goods in the special verdict mentioned were not, by the laws of the United States, under the circumstances mentioned in the said verdict, liable to be attached by the said *Dennie* under the process in the said suit mentioned; but that the said attachment so made by him, as aforesaid, was repugnant to the laws of the United States, and, therefore, utterly void.' In this case no fact was noticed by the court which did not appear in the special verdict.

"So in the case of *Craig et al. v. The State of Missouri*. The parties, in conformity of a law of that state, dispensed with a jury, and

§ 222. An intention to raise a constitutional question is not enough, but it must appear from the record that it was

referred the facts, as well as the law, to the court. The court, in its judgment, stated the facts on which that judgment was founded. It appeared from this statement that the note on which the action was brought was given to secure the repayment of certain loan office certificates, which a majority of the court deemed bills of credit in the sense of the Constitution. This statement of facts made by the court of the state, in its judgment in a case in which the court was substituted for a jury, was, therefore, equivalent to a special verdict. In this case, too, the court looked only at the record. We say with confidence that this court has never taken jurisdiction, unless the case, as stated in the record, was brought within the provisions of the twenty-fifth section of the Judicial Act. There are some cases in which the jurisdiction of the court has been negatived, that are entitled to notice. *Owings v. Norwood's Lessee*, 5 Cr. 344, was an ejectment brought in the General Court of Maryland, for a tract of land lying in Baltimore County. The defendant set up, as a bar to the action, an outstanding title in a British subject, which, he contended, was protected by the treaty of peace. Judgment was given to the plaintiff, and this judgment, being affirmed in the Court of Appeals, was brought before this court. The judgment was affirmed; and the court said, 'Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and, whoever may have this right, it is to be protected; but if the party's title is not affected by the treaty, if he claims nothing under a treaty, his title cannot be affected by the treaty.'

"Upon the same principle, the person who would claim the benefit of the compact between Virginia and Kentucky must show, and he can only show it on the record, that his case is within that compact.

"The case of *Miller v. Nicholls*, 4 Wheat. 312, bears, we think, a strong resemblance to this. William Nicholls, collector, &c., being indebted to the United States, executed, on the 9th of June, 1798, a mortgage to Henry Miller, for the use of the United States, for the sum of fifty-nine thousand four hundred and forty-four dollars, conditioned for the payment of twenty-nine thousand two hundred and seventy-one dollars. Process was issued on this mortgage from the Supreme Court of the State of Pennsylvania; in March, 1802, a *levari facias* was levied, the property sold, and the money, amounting to fourteen thousand five hundred and thirty dollars, brought into court, and deposited with the prothonotary, subject to the order of the court.

"On the 22d of December, 1797, the said Nicholls was found, on a settlement, indebted to the Commonwealth of Pennsylvania in the sum

actually raised and actually decided. And, therefore, where the highest court of a state affirmed a judgment of a court

of nine thousand nine hundred and eighty-seven dollars and fifteen cents, and judgment, therefore, was entered on the 6th of September, 1798. These facts were stated in a case agreed; and the following question was submitted to the court: 'Whether the said settlement of the said public accounts of the said William Nicholls, as aforesaid, on the 22d of December, 1797, was and is a lien from the date thereof, on the real estate of the said William Nicholls, and which has since been sold as aforesaid?'

"On a rule made on the plaintiff in error to show cause why the amount of the debt due to the commonwealth should not be taken out of court, the attorney for the United States came into court, and suggested, 'that the Commonwealth of Pennsylvania ought not to be permitted to have and receive the money levied and produced by virtue of the execution in the suit, because the said attorney, in behalf of the United States, saith, that as well, by virtue of the said execution, as of divers Acts of Congress, and particularly of an Act of Congress, entitled "An Act to provide more effectually for the settlement of accounts between the United States and receivers of public moneys," approved the 3d of March, 1797, the said United States are entitled to have and receive the money aforesaid, and not the said Commonwealth of Pennsylvania. Judgment was rendered in favor of the State of Pennsylvania, which judgment was brought before this court by writ of error.'

"A motion was made to dismiss this writ of error, because the record did not show jurisdiction in this court under the twenty-fifth section of the Judicial Act. It was dismissed, because the record did not show that an Act of Congress was applicable to the case. The court added, 'the Act of Congress, which is supposed to have been disregarded, and which probably was disregarded by the state court, is that which gives to the United States priority in cases of insolvency. Had the fact of insolvency appeared upon the record, that would have enabled this court to revise the judgment of the Court of Pennsylvania. But that fact does not appear.' In this case, the suggestion filed by the attorney for the United States, alleged in terms the priority claimed by the government under an Act of Congress, which was specially referred to. But the case agreed had omitted to state a fact on which the application of that act depended. It had omitted to state that Nicholls was insolvent, and the priority of the United States attached in cases of insolvency only.

"In this case the Act of Congress, under which the United States claimed, was stated in the record, and the claim under it was expressly

below, because no transcript of the record was filed in the appellate court, such affirmance cannot be reviewed in the Supreme Court of the United States.¹ And it is not enough, that the plaintiff in error contended and claimed that the judgment of the court impaired the obligation of a contract, and so violated the provisions of the Constitution of the United States, and that his claim was overruled by the court, but it must appear by clear and necessary intendment of the record, that the question must have been raised, and must have been decided, in order to induce the judgment.² Thus, where the plaintiff in error claimed jurisdiction for the Supreme Court of the United States, upon the ground that an assignment by a bank to trustees had been adjudged void by the state court under an act of the State of Mississippi, and that this act was a violation of the charter of the bank, and so impaired the obligation of a contract; but the records shew that the decision turned upon the construction, not the validity, of the state law, and upon a question of merely local law, the Supreme Court of the United States said: "If the record brought that question before us, undoubtedly we should have jurisdiction, and the judgment of the state court could not be maintained. For it is the same question which this court decided in the case of *The Planters' Bank of Mississippi v. Sharp*, 6 Howard, 301, and

made. But the fact which was required to support the suggestion did not appear in the record. The court refused to take jurisdiction.

"In the case at bar, the fact, that the title of the plaintiff in error was derived from the laws of Virginia, a fact without which the case cannot be brought within the compact, does not appear in the record; for we cannot consider a mere assignment of errors in an appellate court as a part of the record, unless it be made so by a legislative act. The question, whether the Acts of Kentucky, in favor of occupying claimants, were or were not in contravention of the compact with Virginia, does not appear to have arisen; and, consequently, the case is not brought within the 25th section of the Judiciary Act."

¹ *Matheson v. The Branch of the Bank of the State of Alabama, &c.* 7 Howard, 260; *Crawford v. The same*, Ibid. 279.

² *The President, &c., of the Commercial Bank of Cincinnati v. Buckingham's Executors*, 5 Howard, 317.

in *Baldwin and Others v. Payne and Others*, 6 Howard, 332.

But, in order to give this court jurisdiction, the record must show that the point was brought to the attention of the state court and decided by it. It is not sufficient that the point was in the case, and might have been raised and decided. It must appear that the validity of the state law was drawn in question, and the judgment founded upon its validity. This is evidently the meaning of the 25th section of the Act of 1789, which gives the writ of error. And the reason is obvious. The party is authorized to bring his case before this court, because a state court has refused to him a right to which he is entitled under the Constitution or laws of the United States. But if he omits to claim it in the state court, there is no reason for permitting him to harass the adverse party by a writ of error to this court, when, for anything that appears in the record, the judgment of the state court might have been in his favor, if its attention had been drawn to the question. The rule upon this subject is distinctly stated in the case of *Armstrong and Others v. The Treasurer of Athens County*, 16 Pet. 285, where the court said, that when the proceeding is under the law of Louisiana, it must be shown that the point arose and was decided, either by the statement of facts, and the decision as usually set out in such cases by the court, or it must be entered on the record of the proceedings in the appellate court (in cases where the record shows that such a point may have arisen and been decided) that it was in fact raised and decided. In suits at common law, the question is usually presented by the pleadings, or by an exception to the opinion of the court.

"In the case before us the proceedings were under the Louisiana law, and the opinion of the court, according to the practice in that state, is entered on the record, and sets forth the principles of law upon which the decision was made. And it appears that the decision turned upon the construction (not the validity) of the Act of Mississippi of 1840, and

upon a question of merely local law concerning the right by prescription claimed by the trustees.

"Nothing is said in relation to the constitutionality or validity of this Act of Mississippi, and the opinion of the court clearly shows that no such question was raised or decided."¹

§ 223. The distinction here adverted to between the construction and the validity of a state law, enters into a large class of cases, which will be considered hereafter, when we come to treat of the questions within the purview of the statute. At present, it is sufficient to observe that whenever the record shows that the decision of the state court turned on the construction of a state law, and does not show that the question of the validity of the law was raised and decided, the Supreme Court of the United States cannot take jurisdiction.

§ 224. The question must not only appear by the record to have been made, but it must also appear by the record that it was decided by the state court. Both of these matters, the question and the decision, must be capable of being ascertained from the record by the Supreme Court of the United States. That court will not require that the record should recite that the decision was made upon the question, which is the alleged ground of the writ of error; but it must be clear, from the facts stated in the record, by just and necessary inference, that the question was made, and that the state court must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question, as indispensable to that judgment. Thus, where it appeared, so far as the record disclosed, that the judgment of the state court had no reference to any constitutional question, but proceeded upon general principles of

¹ The Grand Gulf Railroad and Banking Company v. Marshall, 12 Howard, 165.

law, the writ of error was dismissed for want of jurisdiction.¹ So, also, where the judgment of the state court involved certain state laws, the invalidity of which, as against the Constitution of the United States, was the ground upon which a writ of error was brought, it was held not to be sufficient for the record to show that the state court might have decided in favor of their validity, but that it must be apparent that the state court did so decide.² So, also, if the question, intended to be reviewed by the writ of error, be the construction of an Act of Congress, it must appear from the record that it was brought to the notice of the state court, and decided by it.³

§ 225. And not only must the record show that one of the questions within the purview of the statute was raised and decided in the state court, but it must also show that the decision was made in the manner required by the statute, in order to give jurisdiction to the Supreme Court of the United States. The provisions of the statute are, that if the validity of a treaty, or statute of, or an authority exercised under, the United States, is drawn in question in a state court, the decision must have been against their validity: if the validity of a statute of, or an authority exercised under, any state, is drawn in question, on the ground of their being repugnant to the Constitution, laws, or treaties of the United States, the decision must have been in favor of the validity of the state law or authority; and if the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under the United States, is drawn in question, the decision of the state court must have been against the title, right, privilege, or exemption specially set up or

¹ *Crowell v. Randall*, 10 Peters, 391.

² *McKinney v. Carroll*, 12 Peters, 66.

³ *Coons v. Gallaher*, 15 Peters, 18; see also *Fullton v. McAfee*, 16 Peters, 149; *Armstrong v. The Treasurer of Athens County*, 16 Peters, 281; *Commercial Bank of Cincinnati v. Buckingham's Executors*, 5 Howard, 371, 341.

claimed by either party under such clause of the Constitution, treaty, statute, or commission.

§ 226. Therefore, where a suit was brought in a state court upon a marshal's bond, under the Act of Congress of April 10th, 1806, ch. 21, by a person injured by a breach of the condition of the bond, and the defendants set up as a defence to the action that the suit ought to have been brought in the name of the United States, and the state court decided that it was well brought by the party injured in his own name, it was held, that the exemption set up being merely as to the form of the action, and no question arising as to the legal liability of the defendants under the Act of Congress, the Supreme Court of the United States had no authority to re-examine the judgment, so far as respected the construction of that part of the act which provided that suits on marshal's bonds "shall be commenced and prosecuted within six years after the said right of action shall have accrued, and not afterwards," this being a mere question as to the time when the right of action accrued to the defendants in error, not involving any right, title, privilege, or exemption under the Act of Congress, which depended upon its construction.¹

¹ *Montgomery v. Hernandez*, 12 Wheaton, 132, "Under these provisions of the statute, we have no authority to re-examine the whole case. We can re-examine so much, and such parts of it only, as come within some one or other of the classes of questions enumerated in the Act of Congress, and so much of the case as must necessarily be decided to arrive at such question.

"It has been insisted for the plaintiff in error, that the question raised upon the record, whether Hernandez, not being a party to the marshal's bond given to the United States, could maintain a suit upon it in his own name only, without suing in the name of the United States for his use, is a question which can be re-examined in this court. We are not of that opinion. It is not every misconception of an Act of Congress by a state court, that will give this court appellate jurisdiction. It is where the party claims upon some title, right, privilege, or exemption, under an Act of Congress, and the decision is *against* such right, title, privilege, or exemption.

"In this case the plaintiff in error did not, and could not claim any right, title, privilege, or exemption, by or under the marshal's bond, or any

§ 227. In like manner, where the Supreme Court of Missouri had decided that a woman claimed to be a slave was free, she having been born at a place under the jurisdiction of the ordinance of 1787, for the government of the North-western Territory, it was held that a writ of error would not lie to the Supreme Court of the United States to reverse this decision, because the decision was in favor of the provisions of the ordinance. But it was said, that if the decision of the state court had been against the provisions of the ordinance, a writ of error might have been brought by the woman, if the ordinance could, under the circumstances, be regarded as an Act of Congress.¹ The ground of this decision

Act of Congress giving authority to sue the obligors for a breach of the condition ; or, at most, his claim to exemption rests upon form, and not substance, as the law expressly charges him, and the objection is only that the name of the United States should have been inserted for the use of the plaintiff.

"However we might be inclined to the opinion that, regularly, and in point of form, the suit should have been in the name of the United States, for the use of Hernandez, we have no jurisdiction or authority to re-examine, and either reverse or affirm the decision of the state court on that ground. The only part of the case over which we can rightfully exercise appellate jurisdiction, is that raised by the supplemental answer, pleading the prescription or bar of six years ; in which the party claims an exemption under the laws of the United States, from liability, as surety of the marshal ; the decision in the state court being against the exemption so specially set up by him.

"The Act of Congress passed in 1806, relating to bonds given by marshals, enacts, "That all suits on marshal's bonds, if the cause of action has already accrued, shall be commenced and prosecuted within three years after the passage of this act, and not afterwards ; and all such suits, in case the right of action shall accrue hereafter, shall be commenced and prosecuted within six years after the said right of action shall have accrued, and not afterwards," &c. (Ingersoll's Dig. 402.)

"It is obvious, that whether this Act of Congress exempts the plaintiff in and from responsibility or not, must depend upon the time when the right of action accrued to Hernandez & Co. for any injury sustained by reason of the marshal's failure to perform his duty."

¹ *Menard v. Aspasia*, 5 Peters, 505 ; but as to the effect of the ordinance, see *Permoli v. The First Municipality of New Orleans*, 3 Howard, 589 ; *Strader v. Graham*, 9 Howard, 261.

was, that the plaintiff in error had no title depending upon an Act of Congress, for the ordinance, instead of creating any title in slaves, expressly prohibited it. But where both parties claim a right or title in a state court, which depends upon the same Act of Congress, the decision of the state court is necessarily within the terms of the Judiciary Act, and the Supreme Court of the United States may revise the decision by writ of error.¹

§ 228. So, also, where the defendant pleaded in the state court his discharge under the Bankrupt Act of 1841, passed by Congress, and the plea was allowed, and the plaintiffs brought a writ of error to the Supreme Court of the United States, it was held, that the decision having been in favor of the privilege or exemption given by the statute, the plaintiffs had no ground for a writ of error, although the defendant might have had, if the decision had been against him.²

¹ *Mathews v. Zane*, 4 Cranch, 382; *Ross v. Doe*, on the Demise of Borland, 1 Peters, 655; *Buel v. Van Ness*, 8 Wheaton, 312.

² *Strader v. Baldwin*, 9 Howard, 261; *Linton v. Stanton*, 12 Howard, 423, 425. In this last case, Mr. Chief Justice Taney, delivering the opinion of the court, said, "The plaintiffs in error, it appears, filed their petition in the Third District Court of New Orleans, against the defendant, to recover certain sums of money which they alleged were due to them on two promissory notes which had been executed by the defendant.

"The defendant pleaded his discharge under the Bankrupt Law of the United States, and at the trial offered in evidence the record of the proceedings in bankruptcy in the district court in which he had obtained his certificate. Objections were taken to the regularity and validity of this discharge, but they were overruled by the court, and judgment rendered for the defendant. The plaintiffs appealed to the Supreme Court of the state, where the judgment of the court below was affirmed, and this writ of error is brought to reverse that judgment.

"The writ must, we presume, have been prosecuted under a misconstruction of the 25th section of the Act of 1789, ch. 20. We have no jurisdiction over the judgment of a state court upon a writ of error, except in the cases specified in that section. And the jurisdiction of this court is there limited with great care, and in plain terms. It gives a writ of error to this court where a party claims a right or exemption

§ 229. But where it appeared that at the trial in the state court, the plaintiff in error claimed the land in dispute under an authority which he alleged had been exercised by the Secretary of the Treasury in behalf of the United States, and the decision was against the validity of the authority thus alleged to have been exercised, it was held to be a proper case for a writ of error.¹ In like manner, where the decision of a state court is in favor of the validity of a state statute, which is alleged to be repugnant to the Constitution, laws, or treaties of the United States, the party, against whom such a decision is made, may revise it in the Supreme Court of the United States by writ of error;² but if the decision of the state court is against the validity of the statute, on the ground that it is repugnant to the Constitution of the United States, a writ of error does not lie.³

under a law of Congress, and the decision is against the right claimed. Undoubtedly the defendant, in pleading his discharge under the Bankrupt Law, claimed a right or exemption under the law of Congress. But in order to give jurisdiction something more is necessary; the judgment of the state court must be against the right claimed. In the case before us the decision was in favor of it, and consequently no writ of error will lie to this court under the provisions of the Act of 1789.

“And as we have no jurisdiction, we cannot examine into the objections made to the validity of the proceedings in bankruptcy. The judgment of the state court that they were valid, and the defendant thereby discharged from the debt due to the plaintiffs, is conclusive between the parties.

“Nor has this court the power to examine into the other question which appears to have arisen as to the legal effect of certain promises which the defendant is alleged to have made after he obtained his certificate in the bankrupt court. The legal obligation of such promises depends upon the laws of the state in which they were made, and in a suit in a state court the decision of that question by the highest tribunal of the state cannot be reviewed in any court of the United States.”

¹ *Strader v. Baldwin*, 9 Howard, 261.

² *Briscoe v. The Bank of the Commonwealth of Kentucky*, 11 Peters, 257.

³ *Walker v. Taylor*, 5 Howard, 64; *The Commonwealth Bank of Kentucky v. Griffith*, 14 Peters, 56. In this case, Mr. Ch. Justice Taney, delivering the opinion of the court, said: “It appears from the record

§ 230. And it is this question of the validity of a state law, or of an authority exercised under a state, on account

that an action was brought in the Circuit Court of the State of Missouri, for the County of Galloway, by the plaintiff in error, in order to recover the amount due on a promissory note, given by the defendants and others to the bank. The defendants, among other things, pleaded, 'that the note sued on was made by the defendants to the plaintiffs, in consideration of the paper of the said Bank of the Commonwealth of Kentucky, and that the said paper was bills of credit, within the meaning of the Constitution of the United States, issued on the credit of the state.' The circuit court overruled this plea, and gave judgment for the plaintiffs. The defendants removed the case to the Supreme Court of the state, where the question above-mentioned was again raised; and it was then decided that the notes of the bank were bills of credit within the meaning of the Constitution of the United States, and that the contract upon which the note in question was given was therefore void; and upon that ground the judgment of the circuit court was reversed, and judgment entered for the defendants. The point is, can this judgment of the state court be re-examined here?

"The question depends altogether upon the construction of the second clause of the twenty-fifth section of the Act of 1789, which provides that the final judgment or decree of the highest court of law or equity in a state, in which a decision could be made, may be re-examined in this court upon a writ of error, 'where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity.' Under this clause of the Act of Congress, three things must concur to give this court jurisdiction.

"1. The validity of the statute of a state, or of an authority exercised under a state, must be drawn in question.

"2. It must be drawn in question upon the ground that it is repugnant to the Constitution, treaties, or laws of the United States.

"3. The decision of the state court must be in favor of their validity.

"In the case before us, the validity of the statute of the State of Kentucky, which chartered the Commonwealth Bank, and the authority exercised under that charter, were drawn in question in the state court; and they were questioned upon the ground of their being repugnant to the Constitution of the United States. But the decision was against their validity, and not in favor of it; and, consequently, the third contingency which is necessary to give jurisdiction to this court has not arisen.

"In the case of *Briscoe and Others v. The Commonwealth Bank*, 11

of its repugnancy to the Constitution, or a law or treaty of the United States, that alone gives jurisdiction to the Supreme Court of the United States. In cases of this class, therefore, it is necessary to distinguish between those decisions of state courts which involve merely the construction of a state law or authority, and those which involve their validity; and also between those decisions which do, and those which do not violate or disregard some provision of the Constitution, laws, or treaties of the United States, by affirming the validity of the state law or authority as against those provisions. Numerous illustrations may be given of both these positions, presenting the distinctions

Peters, 257, the decision of the state court was in favor of the validity of the statute. The party, therefore, who denied its validity, and alleged that it was repugnant to the Constitution of the United States, was entitled to have that question re-examined in the Supreme Court. But it is otherwise by the plain words of the law, when the decision of the state court is against the validity of the state statute, or the authority exercised under it.

“The policy of this distinction is obvious enough. The power given to the Supreme Court by this Act of Congress was intended to protect the general government in the free and uninterrupted exercise of the powers conferred on it by the Constitution, and to prevent any serious impediment from being thrown in its way while acting within the sphere of its legitimate authority. The right was therefore given to this court to re-examine the judgments of the state courts, where the relative powers of the general and state government had been in controversy, and the decision had been in favor of the latter. It may have been apprehended that the judicial tribunals of the states would incline to the support of the state authority against that of the general government; and might, moreover, in different states give different judgments upon the relative powers of the two governments, so as to produce irregularity and disorder in the administration of the general government. But when, as in the case before us, the state authority, or state statute, is decided to be unconstitutional and void, in the state tribunal, it cannot, under that decision, come in collision with the authority of the general government; and the right to re-examine it here is not necessary to protect this government in the exercise of its rightful powers. In such a case, therefore, the writ of error is not given, and the one now before us must be dismissed for want of jurisdiction.

which are to be applied in the examination of the records of state courts, when sought to be reviewed under the 25th section of the Judiciary Act.

§ 231. The first position, then, is, that it is the validity, not the construction, of a state law or authority, that can be the ground of a writ of error. Thus, where the defendant in error brought an action of ejectment in a state court of Pennsylvania, claiming under a deed from a county treasurer, upon a sale made for taxes due on the land to the state, and the plaintiff in error (the defendant below) claimed under a prior deed from the collector of the United States direct taxes, and also offered evidence that, on a certain day, he had paid to the county treasurer the taxes due on the land to the state, in order to redeem it; and, it appeared from the exception in the record, that the defendant admitted that the sale made by the United States collector was not warranted by the Act of Congress, and that his deed was invalid; yet, as he was in possession claiming title, and the deed upon its face purported to convey the land to him, he insisted that the deed, coupled with the possession under it, was sufficient evidence of title to authorize him to redeem the land within the time limited for redemption by the laws of Pennsylvania, after a sale for state taxes;—the Supreme Court of the United States said that the sole question involved in the decision of the state court (which was in favor of the plaintiff below) was, whether a person in possession of land in Pennsylvania, claiming title to it, under a deed which, upon its face, appears to be good, but which is inoperative and invalid, is entitled to redeem the land after it has been sold for taxes due to the state, so as to defeat a purchaser under a state law; and that this question depended solely upon the laws of the state, and not upon any law of the United States. The plaintiff in error had admitted, on the record, that the sale and conveyance made by the United States collector were invalid, and, therefore, no question

was raised or decided upon the validity or construction of the Act of Congress, nor upon the authority exercised under it.¹

§ 232. In like manner, when the legislature of Ohio, in the year 1824, passed a general law relating to banks, imposing six per cent. interest on all notes not redeemed upon demand, and, in 1829, incorporated a bank, in the charter of which twelve per cent. additional damages were given to the holders of bills not redeemed upon demand; and the defendant in error brought a suit in the state court to recover both penalties, and recovered judgment therefor; and the record disclosed that the plaintiffs in error claimed that the application of the law of 1824 to their charter impaired the obligation of a contract, and so violated the Constitution of the United States; and that this claim was overruled by the state court, who decided in favor of the applicability of the law of 1824 to the charter of this bank; the Supreme Court of the United States said, that the question decided by the state court was one of construction, and not of the validity of the Act of 1824.² So, also, where the legislature of Ohio passed "An Act to prohibit the issuing and circulation of unauthorized bank paper," and, in 1839, an act amendatory thereof; and the question was, whether or not a canal company, incorporated in 1837, was subject to these acts, the Supreme Court of the United States said that the Supreme Court of Ohio, in deciding this question, merely gave a construction to an act of Ohio, which neither of itself, nor by its application, involved any repugnancy to the Constitution of the United States, by impairing the obligation of a contract.³

¹ *M'Bride v. Hoey*, 11 Peters, 167.

² *Commercial Bank of Cincinnati v. Buckingham's Executors*, 5 Howard, 317.

³ *Lawler v. Walker*, 14 Howard, 149, 152. In this case, the court, referring to the previous case of *Buckingham's Executors*, said, "This

§ 233. The other distinction, to which we have adverted, is, that the decision of the state court must affirm the

court has already passed upon a certificate of a like kind from Ohio, in the case of the Commercial Bank and Eunice Buckingham's Executors, 5 Howard, 317. That was more to the purpose than this, but it was declared to be insufficient to give jurisdiction to this court. In that case it was certified that the plaintiffs in error relied upon the charter granted them in February, 1829, and the 4th section of it was given; and they claimed, if a section of an Act of 1824 was applied in the construction of their charter, that it would be a violation of the Constitution of the United States, because it impaired the obligation of a contract. It was also stated that the objection had been overruled, and that a decision had been given in favor of the validity of the Act of 1824. When the case was considered here, we first examined our jurisdiction under the 25th section, and determined against it. Not because we did not think that the certificate was a part of the record, or that it did not show sufficiently the act which the plaintiffs in error alleged could not be applied in that case without impairing the obligation of a contract, but because we thought from our view of the entire record, that the only question which was raised on the trial of the case in the state court, was one of construction of two Ohio statutes. And that was, whether or not the bank was legally liable to pay, on account of its refusal to pay its notes in specie, the six per cent. imposed by the Act of 1824, as a penalty for such refusal, in addition to the twelve per cent. imposed by its charter. The constitutionality of the Act of 1824 was not denied. Indeed, it was admitted. But it was urged that the application to make the bank pay the penalty imposed by it, and twelve per cent. besides, would impair the obligation of a contract which the state had made with the corporation in their charter. Here, then, the validity of the Act of 1824 was not drawn in question, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, nor was a point raised for the construction of any clause of the Constitution, of a treaty, or a statute of the United States. The admission of the constitutionality and validity of the Act of 1824, only raised a question of construction of two state statutes, one of which it was said would be repugnant to the other, if its penalty should be applied to the bank, in addition to that imposed by its charter, without words implying that the bank would not be liable to a universal statute, passed before the bank was chartered, which imposes six per cent. upon all banks which should refuse to pay their notes in specie. The court decided, that the bank was liable to the penalty of the Act of 1824, but it erroneously supposed, because a constitutional point had been made in the argument, that it was one which necessarily arose from the case itself, and that it could not give a judgment in the

validity of the state law or authority as against the Constitution, or a law or treaty of the United States; and unless

case upon its merits without deciding that it involved the question of a conflict with the Constitution of the United States. It was in that view of the case that this court said in its opinion, 'It is not enough that the record shows that the plaintiff contended and claimed, that the judgment of the court impaired the obligation of a contract and violated the provision of the Constitution of the United States, and that this claim was overruled by the court, but it must appear by clear and necessary intendment, from the record, that the question must have been raised and must have been decided, in order to induce the judgment.' And it was also in this view, when one state statute was repugnant to another, both being admitted to be constitutional, that it was said in that case, 'It is the peculiar province and privilege of the state courts to construe their own statutes,' and when they did so, 'it was no part of the functions of this court to review their decisions,' or in such cases, 'to assume jurisdiction over them, on the pretence that their judgments have impaired the obligation of contracts.' Having said that this court had not jurisdiction in this case on account of the insufficiency of the certificate, we now say, if it could be made as definite as that in the case of *Buckingham's Executors*, by inserting in it the statutes of Ohio, which the court supposed involved a constitutional question, that it would not give this court jurisdiction. Then the cases would be so much alike, that the *Buckingham* case would rule this as to the question of jurisdiction. In the *Buckingham* case, it was urged that the penalty, in a general statute upon banks, refusing to pay their notes in specie, could not be imposed upon a bank subsequently chartered, in addition to the penalty imposed by its charter, without a violation of the Constitution of the United States. It is urged, in argument in this case, that a statute passed in 1816, entitled, 'An act to prohibit the issuing and circulating of unauthorized bank paper,' which was amended in 1839, could not be applied to make the defendants liable to pay notes which were issued in 1840 by a canal company, in its corporate name, and which notes were meant for circulation in the community as bank paper. It was not contended that the canal company could legally issue such paper for circulation as money, though it was said they could give notes payable to order in payment of its debts.

"It was not denied that the company could give notes in payment of debts, but it was said, that they could not make them for that purpose, and for circulation, as bank paper. The point then raised for decision was, whether the canal company could do so, without making its stockholders and directors liable to pay them to the holders of the notes, under the statute of 1816, amended in 1839. The Supreme Court held

this appears to have been the ground of the decision, it cannot be reviewed in the Supreme Court of the United States. In determining the question of jurisdiction, under the 25th section of the Judiciary Act, the question to be considered is not, strictly, whether the state law or authority violates a provision of the Constitution, or a law or treaty of the United States (for that question belongs to the merits), but it is, whether that question appears to have been raised and decided in the state court. If some other question was in reality raised and decided, if it appears from the record that the question of a conflict between the state law or authority, and a provision of the Constitution, laws, or treaties of the United States was not the question raised

that the defendants in this case, being directors and stockholders of the canal company, were liable, by the statutes of 1816 and 1839, to pay such notes. It seems to us that the statement gives its own answer, and that the Supreme Court, in making its decision, only gave a construction to an act of Ohio, which neither of itself, nor by its application, involved in any way a repugnancy to the Constitution of the United States, by impairing the obligation of a contract. Whether the construction of the act and the charter of the canal company was correct or not, we do not say. We do not mean to discuss that point, or to give any opinion upon it; but we mean to say, that the construction does not violate a constitutional point under the 25th section of the Judiciary Statute, so as to give this court jurisdiction of this cause.

“If more was wanting in aid of our conclusion, it is to be found in the pleadings of the case, in the evidence given on the trial, the objections made to the admissibility of certain parts of it, in the prayers of the defendant to the court to instruct the jury, and in the charge which the court gave. By no one of them is a constitutional question raised. It was only suggested, in argument, and on that account it was, that the court certified that the ‘validity of statutes of Ohio was drawn into question, which were said to be in violation of the Constitution of the United States, and not because the court considered that such a point had been rightly raised before it, under the 25th section of the Judiciary Act of 1789.’

“We do not think it necessary to repeat anything which this court has hitherto said, from an early day to the present, concerning the 25th section. Its interpretation will be found in the case of *Crowell v. Randall*, 10 Peters, 308; in other cases, cited in that case; and in *Armstrong v. The Treasurer of Athens County*, 16 Peters, 281.”

and decided, the Supreme Court of the United States cannot entertain jurisdiction.

§ 234. But if the question of repugnancy with the Constitution, laws, or treaties of the United States, was raised and decided in the state court in favor of the validity of the state law or authority, the decision may be reviewed in the Supreme Court of the United States, although there is in fact no such repugnancy.

§ 235. Thus, where, in an action of ejectment, the Supreme Court of Pennsylvania had decided that the relation of landlord and tenant could not exist between persons holding under a Connecticut title, and, consequently, that the defendant could set up a title as against the plaintiff; and the legislature of Pennsylvania afterwards passed an act, declaring that "the relation of landlord and tenant shall exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants, as between other citizens of this commonwealth, on the trial of any cause now pending, or hereafter to be brought within this commonwealth, any law or usage to the contrary notwithstanding;" and, on the revival of the cause in the state court, it was objected that the act of the legislature impaired the obligation of a contract, the defendant's title having been derived from the state itself; but the court held that the act was constitutional and binding, and that it altered the law as previously declared;—the Supreme Court of the United States retained jurisdiction of a writ of error, because it sufficiently appeared from the record, that the question of repugnancy between the statute of the state and the Constitution of the United States, arose and was decided, although when they came to the merits of this question, they held that there was no such repugnancy.¹

¹ *Satterlee v. Mathewson*, 2 Peters, 380, 407, 408, 409. See also *Jackson v. Lamphire*, 3 Peters, 280; *Mills v. St. Clair County*, 8 Howard, 569.

§ 236. The question which gives jurisdiction to the Supreme Court of the United States, in cases where the validity of state laws is involved, being the precise question of a conflict between the law, as sustained by the decision of the state court, and some provision of the Constitution, laws or treaties, of the United States, it is necessary to distinguish that question from all others. A state law may violate the provisions of a state constitution, or it may be retrospective, or it may be an abuse of authority, or oppressive or arbitrary; but unless it violates some provision of the Constitution of the United States, or conflicts with some constitutional Act of Congress, the decision of the state court cannot be reviewed in the Supreme Court of the United States on writ of error. It is true, as we have just seen, that if the question appears, by fair and necessary intendment of the record, to have been raised and decided, the party against whom judgment has been given by the state court, has a right to bring the merits into the Supreme Court of the United States, and to be there heard upon the supposed conflict between the state law and the Constitution, laws, or treaties of the United States. But whether the cause will be dismissed upon the preliminary question of jurisdiction, or whether the court will proceed to examine the merits and determine the question of such conflict, and so reverse or affirm the judgment of the state court, must depend upon the question exhibited by the record, and the real question involved. In general, if the record shows that the question of a conflict between the state law and a provision of the Constitution, laws, or treaties, was raised and passed upon by the state court, although the actual merits may involve some other question, and not this, jurisdiction will be so far taken as to examine the merits, and to show that the question on which the case turns is not one of which the Judiciary Act gives cognizance to the Supreme Court of the United States. If the record does not show that the question contemplated by the statute was raised or decided, or shows that some other question is the sole question involved, the cause will be dismissed for want of jurisdiction.

It is important, therefore, to examine the decisions which establish and illustrate the line of demarcation between the question which the statute makes the ground of a writ of error, in this class of cases, and all other questions.

§ 237. Thus, whether a state law impairs the obligation of a contract, is a question which depends upon the fact of their being a contract, within the meaning of that clause of the Constitution of the United States which forbids the passing of laws impairing the obligation of contracts, and upon the inquiry whether the state law impairs its obligation, in the sense of the Constitution. It will not be an irrelevant digression, but, on the contrary, will tend to illustrate the true nature of the question which gives jurisdiction to the Supreme Court of the United States in this class of cases, if we here examine the doctrine on this subject, in detail.

§ 238. What contracts are within the meaning of this clause of the Constitution, is a question that has been much discussed. Contracts, as a general term, embrace all compacts between two or more parties, and include those which are executed, as well as those which are executory; and unless there is something in the general purposes of this provision of the Constitution, from which a narrower meaning of the term, as used in this clause, is to be inferred, its construction in this connexion should be as broad as its general import. One of the earliest questions which arose under this provision was, whether the grant of a state is a contract, the inviolability of which was intended to be secured; and it was settled, upon great consideration, that a grant, being a contract executed, the obligation of which still continues, and the terms of the Constitution admitting of no distinction between the contracts of a state and those of an individual, the grant of a state was clearly within the inhibition.¹ The

¹ *Fletcher v. Peck*, 6 Cranch, 87, 135. The reasoning of the court (by Marshall, Ch. Justice) upon this question, was as follows: "When, then, a law is in its nature a contract, when absolute rights have vested

case in which this important principle was settled, was that of a grant by the State of Georgia of certain lands, and the

under that contract, a repeal of the law cannot divest those rights, and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

"To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public be in the nature of the legislative power, is well worthy of serious reflection.

"It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the Constitution is silent, never has been, and, perhaps, never can be, definitely stated.

"The validity of this rescinding Act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own Constitution. She is a part of a large empire; she is a member of the American Union; and that Union has a Constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The Constitution of the United States declares, that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. Does the case now under consideration come within the prohibitory section of the Constitution?

"In considering this very interesting question, we immediately ask ourselves, what is a contract? Is a grant a contract?

"A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one that is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguish-

violation complained of was a resumption of the grant by a repeal of the act. It was soon followed by a case where the

ment of the right of the grantor, and implies a contract not to re-assert that right. A party is, therefore, always estopped by his own grant.

"Since then, in fact, a grant is a contract executed, the obligation of which still continues; and, since the Constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law, annulling conveyance between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding these grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected.

"If, under a fair construction of the Constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

"The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

"Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each state.

"No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

"A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

"In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of

State of New Jersey had passed an act, by which certain lands, directed to be purchased for the use of an Indian

contracts, an exception in favor of the right to impair the obligation of those contracts into which the state may enter?

"The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law, annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder. Why, then, is it allowable in the form of a law annulling the original grant?

"The argument in favor of presuming an intention to except a case, not excepted by the words of the Constitution, is susceptible of some illustration from a principle originally ingrafted in that instrument, though no longer a part of it. The Constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual states. A state, then, which violated its own contract was suable in the courts of the United States for that violation. Would it have been a defence in such a suit to say that the state had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defence could be set up. And yet, if a state is neither restrained by the general principles of our political institutions, nor by the words of the Constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. This feature is no longer found in the Constitution; but it aids in the construction of those clauses with which it was originally associated.

"It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired, and rendered null and void."

tribe, were declared to be for ever exempted from taxation. After enjoying the lands for a time, the Indians applied for and obtained an act giving them leave to sell the lands, but the privilege of exemption from taxation remained unrepealed. The state afterwards undertook to tax the lands in the hands of the grantees of the Indian title. The Supreme Court of the United States held that the original grant was a contract, of which the exemption from taxation was an essential feature, and that a law which annulled it impaired the obligation of the contract.¹ In a subsequent case, it was held, upon very full consideration, that the prohibition of the Constitution embraces all contracts, executed or executory, between private individuals, or a state and individuals, or corporations, or between the states themselves.² It extends also to contracts between a state and the United States.³

§ 239. But the question whether a charter, or act of incorporation, constitutes a contract between the state and the incorporators, within the meaning of this clause of the Constitution, was one of greater difficulty, and its discussion has greatly developed the operation of this provision. The great questions of what charters or acts of incorporation are to be deemed contracts, within the sense of this provision, and whether it embraces any other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice, arose in the case of *Dartmouth College v. Woodward*, where the legislature of New Hampshire undertook to alter the ancient charter of the college, by increasing the number of its trustees, giving the appointment of the additional members to the executive of the state, and adding a board of overseers. The doc-

¹ *State of New Jersey v. Wilson*, 7 Cranch, 164. See also *Terret v. Taylor*, 9 Cranch, as to the irrevocable character of a legislative grant.

² *Green v. Biddle*, 8 Wheaton, 1, 90, 94.

³ *Neil et al. v. The State of Ohio*, 3 Howard, 720; *Searight v. Stokes*, *Ibid.* 151.

trines established by this case are that a charter, or act of incorporation, which is a grant of political power, or which creates a civil institution, to be employed in the administration of the government, or which makes the funds of a college public property, or gives the state alone, as a government, an interest in its administration, does not constitute a contract, within the meaning of this prohibition of the Constitution; but a charter or act creating a private eleemosynary corporation, endowed with a capacity to take property for objects unconnected with government, and deriving its funds from individuals, who have stipulated for the future disposition and management of those funds in a manner prescribed by themselves, constitutes a contract between the government and the corporators, that may be impaired by subsequent interference; and the fact that the property is vested by the donors in trustees, for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, creates no exception which can take the case out of the prohibition. The general proposition that those contracts only are protected by the Constitution, a beneficial interest in which is vested in the party who appears in court to assert that interest, was neither affirmed nor denied by the court. They did not consider it clear that the trustees in this case had not such a beneficial interest in themselves; but upon general principles, they held that in private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, have rights under a contract which are protected by the Constitution. The violation of this contract, in the present case, consisted in placing the funds, which had been put by the donors into the hands of trustees named in the charter, and empowered by it to perpetuate themselves, under the control of the government of the state.¹ The following is the reasoning of Chief Justice Marshall in this celebrated case:

¹ *Dartmouth College v. Woodward*, 4 Wheaton, 518, 624.

"It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

"The points for consideration are,

"1. Is this contract protected by the Constitution of the United States?

"2. Is it impaired by the acts under which the defendant holds?

"1. On the first point it has been argued that the word 'contract,' in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation, which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the Constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the Constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term '*contract*' must be understood in a

more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right to property. That anterior to the formation of the Constitution, a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the state legislatures were forbidden 'to pass any law impairing the obligation of contracts,' that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the Constitution must, in construction, receive some limitation, it may be confined, and ought to be confined, to cases of this description—to cases within the mischief it was intended to remedy.

"The general correctness of these observations cannot be controverted. That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not so construed, may be admitted. The provision of the Constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

"The parties in this case differ less on general principles,

less on the true construction of the Constitution in the abstract, than on the application of those principles to the case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States.

“But, if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the owners have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that these arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them for ever, may not assert all the rights which they possessed while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives in the eye of the law as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter.

“It becomes, then, the duty of the court most seriously to examine this charter, and to ascertain its true character.

“From the instrument itself, it appears that about the year 1754, the Rev. Eleazer Wheelock established, at his own expense, and on his own estate, a charity school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England for carrying on and extending his undertaking. In this pious work he employed the Rev. Nathaniel Whittaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others trustees of the money which had been, and should be contributed, which appointment Dr. Wheelock confirmed by a deed of trust authorizing the trustees to fix on a site for the college. They determined to establish the school on the Connecticut River, in the western part of New Hampshire; that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English, and the proprietors in the neighborhood having made large offers of land, on condition that the college should there be placed. Dr. Wheelock then applied to the crown for an act of incorporation, and represented the expediency of appointing those whom he had by his last will named as trustees in America, to be members of the proposed corporation. ‘In consideration of the premises,’ ‘for the education and instruction of the youth of the Indian tribes,’ &c., ‘and also of English youth, and any others,’ the charter was granted, and the trustees of Dartmouth College were by that name created a body corporate, with power, *for the use of the said college*, to acquire real and personal property, and to pay the president, tutors, and other officers of the college, such salaries as they shall allow. The charter proceeds to appoint Eleazer Wheelock, ‘the founder of said college,’ president thereof, with power, by his last will, to appoint a successor, who is to continue in office until disapproved by the trustees. In case of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, *being one of the*

trustees, shall exercise the office, until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies which may be created in their own body, by death, resignation, removal, or disability; and also to make orders, ordinances, and laws, for the government of the college, the same not being repugnant to the laws of Great Britain, or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees.

“This charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college, was conveyed to, and vested in, the corporate body.

“From this brief review of the most essential parts of the charter, it is apparent that the funds of the college consisted entirely of private donations. It is, perhaps, not very important who were the donors. The probability is, that the Earl of Dartmouth and the other trustees in England, were, in fact, the largest contributors. Yet the legal conclusion, from the facts recited in the charter, would probably be, that Dr. Wheelock was the founder of the college.

“The origin of the institution was, undoubtedly, the Indian charity school, established by Dr. Wheelock at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent, and the trustees, who received the money, were appointed by, and act under, his authority. It is not too much to say, that the funds were obtained by him, in trust, to be applied by him to the purposes of his enlarged school. The charter of incorporation was granted at his instance. The persons named by him in his last will, as the trustees of his charity school, compose a part of the corporation, and he is declared to be the founder of the college, and its president for life. Were the inquiry material, we should feel some hesitation in saying that Dr. Wheelock was not, in law, to be considered as the

founder of this institution, and as possessing all the rights appertaining to that character. But, be this as it may, Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds the salaries of the tutors are drawn, and these salaries lessen the expense of education to the students. It is, then, an eleemosynary, and, as far as respects its funds, a private corporation.

“Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority?

“That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

“Dr. Wheelock, as the keeper of his charity school, instructing the Indians in the art of reading, and in our holy religion, sustaining them at his own expense, and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the legislature have supposed that his private funds, or those given by others, were subject to legislative management, because they were applied to purposes of education. When, afterwards, his

school was enlarged, and the liberal contributions made in England and in America enabled him to extend his cares to the education of the youth of his own country, no change was wrought in his own character, or in the nature of his duties. Had he employed assistant tutors with the funds contributed by others, or had the trustees in England established a school with Dr. Wheelock as its head, and paid salaries to him and his assistants, they would still have been private tutors; and the fact, that they were employed in the education of youth, could not have converted them into public officers, concerned in the administration of public duties, or have given the legislature a right to interfere in the management of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute this trust uncontrolled by legislative authority. Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn; for its foundation is purely private and eleemosynary. Not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered. A corporation is an artificial being, invisible, intangible, and existing only in the contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessities of perpetual

conveyances, for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the government has given it the power to take and to hold property in a particular form and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognised, and is supported by no authority. Can it derive aid from reason?

“The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant. In most eleemosynary institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable, or public-spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impos-

sible to effect their design securely, and certainly, without an incorporating act. They apply to the government, state their beneficent object, and offer to advance the money necessary for its accomplishment, provided the government will confer on the instrument which is to execute their design, the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund, for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.

“From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control. Neither, in reason, can the incorporating act change the character of a private eleemosynary institution.

“We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured? The counsel for the defendant have insisted, that the beneficial interest is in the people of New Hampshire. The charter, after reciting the preliminary measures which had been taken,

and the application for an act of incorporation, proceeds thus: 'Know ye, therefore, that we, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and also, that the best means of education be established in our province of New Hampshire, for the benefit of said province, do, of our special grace,' &c. Do the expressions bestow on New Hampshire any exclusive right to the property of the college, any exclusive interest in the labors of the professors? Or do they merely indicate a willingness that New Hampshire should enjoy those advantages which result to all from the establishment of a seminary of learning in the neighborhood? On this point we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate, that the 'benefit intended for the province' is that which is derived from 'establishing the best means of education therein;' that is, from establishing in the province Dartmouth College, as constituted by the charter. But, if these words, considered alone, could admit of doubt, that doubt is completely removed by an inspection of the entire instrument.

"The particular interests of New Hampshire never entered into the minds of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and sole objects of their contributions. In these, New Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was 'most subservient to the great ends in view,' and because liberal donations of land were offered by the proprietors, on condition that the institution should be there established. The real advantages from the location of the college, are perhaps, not less considerable to those on the west, than to those on the east side of Connecticut River. The

clause which constitutes the incorporation, and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, 'and also of English youth, and any others.' So that the objects of the contributors, and the incorporating act, were the same; the promotion of Christianity, and of education generally, not the interests of New Hampshire particularly.

"From this review of the charter, it appears, that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

"Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract as the Constitution intended to withdraw from the power of state legislation? Contracts, the parties to which have a vested

beneficial interest, and those only, it has been said, are the objects about which the Constitution is solicitous, and to which its protection is extended. The court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him, and them, to perpetuate their beneficent intention. It was granted. An artificial, immortal being, was created by the crown, capable of receiving and distributing for ever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors, or their posterity, but for something in their opinion of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amounting collectively to a most important interest. These are, in the aggregate, to be exercised, asserted, and protected, by the corporation. They were as completely out of the donors, at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

“According to the theory of the British Constitution, their Parliament is omnipotent. To annul corporate rights might

give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had Parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors could have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said, that the trustees, in whom the rights of all were combined, possessed no private, individual beneficial interest in the property confided to their protection. Yet the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now what it was in 1769.

“This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds), were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the Constitution, and within its spirit also, unless the fact, that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the Constitution.

“It is more than possible, that the preservation of rights of this description was not particularly in the view of the framers of the Constitution, when the clause under consideration was introduced into that instrument. It is probable, that interferences of more frequent recurrence, to which the

temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception.

“On what safe and intelligible ground can this exception stand? There is no expression in the Constitution, no sentiment delivered by its cotemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the Constitution, not warranted by its words? Are contracts of this description of a character to excite so little interest, that we must exclude them from the provisions of the Constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration, as to compel us, or rather permit us to say, that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed as to exclude it?

“Almost all eleemosynary corporations,—those which are created for the promotion of religion, of charity, or of education,—are of the same character. The law of this case is

the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations they are identified with, and personated by, the trustees; and their rights are to be defended and maintained by them. Religion, charity, and education, are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend by the corporation. Are they of so little estimation in the United States, that contracts for their benefit must be excluded from the protection of words, which in their natural import include them? Or do such contracts so necessarily require new modelling by the authority of the legislature, that the ordinary rules of construction must be disregarded in order to leave them exposed to legislative alteration? All feel that these objects are not deemed unimportant in the United States. The interest which this case has excited, proves that they are not. The framers of the Constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science, by reserving to the government of the Union the power 'to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.' They have so far withdrawn science and the useful arts from the action of the state governments. Why, then, should they be supposed so regardless of contracts made for the advancement of literature, as to intend to exclude them from provisions made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived.

"If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the Constitution, neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent as

to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver that the disposition he makes of them is immutable. It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time that any act of incorporation institutes no security for the institution; believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive hope, that the charity will flow for ever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidences of the universality of this sentiment, there can be but little reason to imagine that the framers of our Constitution were strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy, and repeated interferences, produced the most perplexing and injurious embarrassments, they still deem it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful, to justify the construction which makes it.

“The motives suggested at the bar grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government, and the presumption that, if allowed to continue themselves, they now are, and must remain for ever, what they originally were. Hence is inferred the necessity of applying to this corpo-

ration, and to other similar corporations, the correcting and improving hand of the legislature.

“It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees, deriving their power from a regal source, must, necessarily, partake of the spirit of their origin, and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college, and to guide the students. Before we inquire into the influence which this argument ought to have on the constitutional questions, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter by the crown; but at whose suggestion were they named? By whom were they selected? The charter informs us. Dr. Wheelock had represented, that, for many weighty reasons, it would be expedient that the gentlemen whom he had nominated in his last will, to be trustees in America, should be of the corporation now proposed. When, afterwards, the trustees are named in the charter, can it be doubted that the persons mentioned by Dr. Wheelock in his will were appointed? Some were probably added by the crown, with the approbation of Dr. Wheelock. Among these is the Doctor himself. If any others were appointed at the instance of the crown, they are the Governor, three members of the Council, and the speaker of the House of Representatives of the Colony of New Hampshire. The stations filled by these persons ought to rescue them from any other imputation than too great a dependence on the crown. If in the revolution that followed, they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation, which suspicion might excite, would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Wheelock, and those who were added to his nomination, most probably with his approbation, were among the most eminent and respectable individuals in New Hampshire.

“The only evidence which we possess of the character of Dr. Wheelock is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his endeavors, would lead to the opinion, that he united a sound understanding to that humanity and benevolence which suggested his undertaking. It surely cannot be assumed that his trustees were selected without judgment. With as little probability can it be assumed, that, while the light of science and of liberal principles pervades the whole community, these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement ; that, while the human race is rapidly advancing, they are stationary. Reasoning *à priori*, we should believe that learned and intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors ; men as well fitted for the government of a college as those who might be chosen by other means. Should this reasoning ever prove erroneous in a particular case, public opinion, as has been stated at the bar, would correct the institution. The mere probability of the contrary would not justify a construction of the Constitution which should exclude these contracts from the protection of a provision whose terms comprehended them.

“The opinion of the court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired, without violating the Constitution of the United States. This opinion appears to us to be equally supported by reason, and by the former decisions of this court.

“2. We next proceed to the inquiry, whether its obligation has been impaired by those acts of the legislature of New Hampshire to which the special verdict refers.

“From the review of this charter, which has been taken, it appears, that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the

students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown, it was expressly stipulated, that this corporation, thus constituted, should continue for ever; and that the number of trustees should for ever consist of twelve, and no more. By this contract the crown was bound, and could have made no violent alterations in its essential terms without impairing its obligations.

“By the Revolution, the duties, as well as the powers of government, devolved on the people of New Hampshire. It is admitted, that among the latter was comprehended the transcendent power of Parliament, as well as that of the executive department. It is too clear to require the support of argument, that all contracts, and rights, respecting property, remained unchanged by the Revolution. The obligations, then, which were created by the charter to Dartmouth College, were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present Constitution of the United States, would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restriction upon the legislature to be found in the Constitution of the state, but the Constitution of the United States has imposed this additional limitation, that the legislature of a state shall pass no act ‘impairing the obligation of contracts.’ It has been already stated that the act ‘to amend the charter, and enlarge and improve the corporation of Dartmouth College,’ increases the number of trustees to twenty-one, gives the appointment of the additional numbers to the executive of the state, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

“On the effects of this law two opinions cannot be enter-

tained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the state. The will of the state is substituted for the will of the donors in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not merely for the perpetual application of the funds which they gave, to the objects for which those funds were given; they contracted, also, to secure that application by the constitution of the corporation. They contracted for a system which should, as far as human foresight can provide, retain for ever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is reorganized; and reorganized in such a manner, as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which this property was given.

“On the view which has been taken of this interesting case, the court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors and founders, for the benefit of religion and literature. Yet it is not clear that the trustees ought to be considered as destitute of such beneficial interest in themselves

as the law may respect. In addition to their being the legal owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea, that trustees may also be tutors with salaries. The first president was one of the original trustees; and the charter provides, that in case of vacancy in that office, 'the senior professor or tutor, *being one of the trustees*, shall exercise the office of president, until the trustees shall make choice of, and appoint a president.' According to the tenor of the charter, then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest. Even if the proposition of the counsel for the defendant were sustained; if it were admitted that those contracts only are protected by the Constitution, a beneficial interest in which is vested in the party, who appears in court to assert that interest; yet it is by no means clear, that the trustees of Dartmouth College have no beneficial interest in themselves.

"But the court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the Constitution."

§ 240. Pursuing the analysis of the cases which have involved contracts between a state and individuals, created by charter, the next in order of time is the case of *The Providence Bank v. Billings*, in which the legislature of Rhode Island had granted a charter of incorporation to a bank, and afterwards passed an act imposing a tax upon all banks within the state, except the Bank of the United States, the levying of which the plaintiffs in error resisted, on the ground that the law impaired the contract of their charter. The charter

contained no stipulation promising exemption from taxation ; but it was contended that such an exemption was implied. The Supreme Court of the United States held that the taxing power of a state being essential to the existence of its government, its relinquishment was not to be presumed, but must be expressly shown ; that the object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men ; and that any privileges which might exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist.¹

§ 241. The great argument, pressed in this case, was, that the power of taxation was inconsistent with the charter, because it might be so exercised as to make the charter of no value, and thus destroy the object for which it was given. But the court said, "If the power of taxation is inconsistent with the charter, because it may be so exercised as to destroy the object for which the charter is given ; it is equally inconsistent with every other charter, because it is equally capable of working the destruction of the objects for which every other charter is given. If the grant of a power to trade in money to a given amount, implies an exemption of the stock in trade from taxation, because the tax may absorb all the

¹ *Providence Bank v. Billings*, 4 Peters, 514, 558, 561. The subsequent cases of *Gordon and Cheston v. The Appeal Tax Court*, 3 Howard, 133, present an instance in which an exemption from taxation may be created by the terms of a charter. The legislature of Maryland, in 1821, continued the charters of several banks to 1845, upon condition that they would make a road and pay a school-tax. It was held that this exempted their franchise, but not their property, from taxation generally. A further clause in the law provided, that upon any of the banks accepting of, and complying with the terms and conditions of the act, the faith of the state was pledged not to impose any further tax or burden upon them during the continuance of their charters under the act : and it was held, that this was a contract relating to something beyond the franchise, and exempted the stockholders from a tax levied upon them as individuals, according to the amount of their stock.

profits, then the grant of any other thing implies the same exemption; for that thing may be taxed to an extent which will render it totally unprofitable to the grantee. Land, for example, has in many, perhaps in all the states, been granted by government since the adoption of the Constitution. This grant is a contract, the object of which is, that the profits issuing from it shall enure to the benefit of the grantee. Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all; and the proposition appears so extravagant, that it is difficult to admit any resemblance in the cases. And yet, if the proposition for which the plaintiffs contend be true, it carries us to this point. That proposition is, that a power which is in itself capable of being exerted to the total destruction of the grant, is inconsistent with the grant; and is therefore impliedly relinquished by the grantor, though the language of the instrument contains no allusion to the subject. If this be an abstract truth, it may be supposed universal. But it is not universal; and therefore its truth cannot be admitted, in these broad terms, in any case. We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction.

“The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right, that it must bear a portion of the public burdens; and that portion must be determined by the legislature. This vital power may be abused; but the Constitution of the United States was not intended to furnish the correction for every abuse

of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation; as well as against unwise legislation generally. This principle was laid down in the case of *McCullough v. The State of Maryland*; and in *Osborn et al. v. The Bank of the United States*. Both these cases, we think, proceeded on the admission that an incorporated bank, unless its charter shall express the exemption, is no more exempted from taxation than an incorporated company would be, carrying on the same business."

§ 242. The distinction between this case and the cases of *Dartmouth College*, *Fletcher v. Peck*, and *New Jersey v. Wilson*, exhibits one limitation of the constitutional prohibition, in the meaning to be attached to "the obligation" of a contract, as between the state and an individual. In the three previous cases, either an express stipulation of the contract was violated, or the contract itself was annulled. In the case of *Dartmouth College*, the express provisions of the charter respecting the number and appointment of the trustees, and the custody and administration of the funds, were attempted to be changed; in *Fletcher v. Peck*, the state undertook to annul its own grant; in the case of *New Jersey v. Wilson*, there was an express stipulation exempting the land from taxation. All these decisions might have resulted otherwise than against the validity of the acts of the state, had the power to do these things been reserved, or had it not been from the absence of such reservation, a necessary inference that it was surrendered. The making of an unconditional and fee-simple grant, however, is of itself a surrender of all power to resume the object of the grant; a stipulation that there shall be a certain number of trustees, and that they shall perpetuate themselves, is of itself a surrender of all control over their numbers and appointment; a stipulation exempting land from taxation is of itself a surrender

of the power of taxation in respect to the particular land. These things are respectively of the essence of the contract; each of them constitutes the thing which the state has covenanted or assured to the party; and consequently it enters into the obligation of the contract, which is impaired, where the state attempts to exercise a power, which it has expressly agreed to forbear. But with regard to the ordinary and essential powers of government, not expressly limited by the terms of a charter, or the surrender of which is not necessarily involved in the grant, a forbearance of their exercise cannot be ingrafted into the obligation of the contract, by implications arising from the extent to which the exercise of the power may be carried, although it might extend to the entire destruction of the value of the grant. In order to make such a forbearance part of the obligation of the contract, it must be expressly stipulated in the charter, or must be inherent in the very nature of the grant, so that the exercise of the power would not merely destroy the value of the grant, but would annul and vacate the grant itself.

§ 243. Whether such a forbearance to exercise the otherwise unquestionable powers of government forms part of the obligation of the contract, because it is stipulated or is inherent in the very nature of the grant, is often the difficult question arising upon charters of incorporation. It has indeed been strenuously contended, that the true question is much broader than this; that the obligation is not to be limited to a forbearance expressly covenanted, or to one inherent in the very nature of the grant, but that it ought to be held to embrace every forbearance that by just and liberal interpretation can be fairly implied from the objects and purposes of the grant. If this latter doctrine be the true one, it leads to the conclusion, that an exercise of power which impairs the value of a franchise, impairs the obligation of the contract, because it is equivalent to a destruction or resumption of the grant itself. This conclusion, however, as we have seen, was denied by the Supreme Court of the

United States, in the case of the Providence Bank, with respect to the power of taxation. But whether the doctrine itself be or be not correct, with respect to all the powers of government, depends upon the rule of construction that is to be applied to grants of this description. If the rule is adopted, that such grants are to be construed strictly, and that no exclusive privileges, or immunities from the general powers of government, are to be implied, then the contract can be held to embrace no agreement to forbear the exercise of the ordinary powers of government, beyond what is expressly stipulated, or what is necessarily inherent in the very nature of the grant.¹ But if, on the other hand, a broader rule of construction is adopted, if such grants are to be construed to embrace all such exclusive rights, and all such surrenders of power by the state, as by fair and reasonable intendment may be implied from the objects and purposes of the grant, or are necessary to the beneficial enjoyment of the franchise intended to be created, then the obligation of the contract will embrace a stipulation on the part of the state not to do anything which will impair the value of the grant.

¹ I use the expression "inherent in the nature of the grant," to describe those stipulations which are necessarily involved in the grant, and not those which are to be inferred, by implication, from its objects and purposes. Thus, when a state makes a grant of land without reservation, it is, without any negative stipulation, necessarily implied that the state will not undertake to resume it. So, if the state creates a franchise, the right to hold and exercise the franchise is inherent in the nature of the grant, that is, is necessarily involved in it. It is, to be sure, but a step from this position, to say that the right to enjoy all the benefits of the franchise unimpaired, as they flow from the objects and purposes of the grant, is equally to be implied; and many learned minds have maintained the position, that to impair the value of a franchise, by the exercise of a power which diminishes or takes away the profits which constitute its objects and purposes, is equivalent to a resumption or annihilation of the right itself. But here the rule of construction intervenes, which declares, that in public grants, no rights are to be deemed to be surrendered by the government, except those which the words of the grant, by their natural and proper construction, purport to convey, and this excludes all implication, and admits of any exercise of power that does not destroy the franchise itself.

§ 244. It was this great question of the rule of construction, which gave rise to such widely opposite conclusions in the case of *The Charles River Bridge v. The Warren Bridge* in the Supreme Court of the United States. A majority of the court then adopted, and have since followed the rule—in determining the application to state grants of this clause of the Constitution, which prohibits the impairing of the obligation of contracts—that such grants are to be construed strictly, and that exclusive privileges, or surrenders of power by the state, not expressly stipulated, are not to be implied. They held that this rule had, in truth, been applied in the case of the *Providence Bank*, and that its application to the case at bar led to the same conclusion, namely, that where a charter is silent with respect to exclusive privileges or engagements of the state not to exercise its ordinary powers, a contract for such privileges or such forbearance is not to be implied from the fact that the exercise of the power diminishes, or even destroys the value of the franchise.¹ Mr.

¹ *The Charles River Bridge v. The Warren Bridge*, 7 Peters, 420, 536, 547. In this case, Mr. Ch. Justice Taney, delivering the opinion of the majority of the court, and speaking of the case of the *Providence Bank*, said: "The case now before the court is, in principle, precisely the same. It is a charter from a state. The act of incorporation is silent in relation to the contested power. The argument in favor of the proprietors of the *Charles River Bridge*, is the same, almost in words, with that used by the *Providence Bank*; that is, the power claimed by the state, if it exists, may be so used as to destroy the value of the franchise they have granted to the corporation. The argument must receive the same answer; and the fact that the power has been already exercised so as to destroy the value of the franchise, cannot, in any degree, affect the principle. The existence of the power does not, and cannot depend upon the circumstance of its having been exercised or not.

"It may, perhaps, be said, that in the case of the *Providence Bank*, this court were speaking of the taxing power; which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new chan-

Justice Story, on the other hand, adopted the opposite rule of construction, and came to the opposite conclusion.¹

§ 245. The principal question in this case was, whether an act of the legislature of Massachusetts, authorizing the construction of a free bridge between Boston and Charlestown, was a violation of the plaintiffs' charter, which had previously authorized them to erect and maintain a toll-bridge between the same places, because it destroyed the value of the plaintiffs' franchise. The decision, however gravely it may be regretted, or its correctness doubted, involved the principle that the obligation of a contract, embraced in a charter of incorporation, which is silent as to exclusive privileges, cannot be extended to embrace such privileges, although their enjoyment is essential to the enjoyment of any value in the franchise itself, and although the act complained of may totally destroy that value.

nels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges that a state has surrendered, for seventy years, its power of improvement and public accommodation in a great and important line of travel, along which a vast number of its citizens must daily pass; the community have a right to insist, in the language of the court above quoted, 'that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear.' The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred then to the hands of privileged corporations. The rule of construction announced by the court was not confined to the taxing power, nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving undiminished the power then in question; and whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power, or any other affecting the public interest, the same principle applies, and the rule of construction must be the same."

¹ See his dissenting opinion, 7 Peters, 583.

§ 246. The rules of construction adopted by the Supreme Court of the United States, by this and subsequent cases, are two. First, that in a grant designed by the sovereign power making it to be a general benefit and accommodation to the public, if the meaning of the words be doubtful, they shall be taken most strongly against the grantee and for the government, and therefore should not be extended in favor of the grantee beyond the natural and obvious meaning of the words employed; and if these do not support the right claimed, it must fall. Secondly, if the grant admits of two interpretations, one of which is more extended, and the other more restricted, so that a choice is fairly open, and either may be adopted without any violation to the apparent objects of the grant, if, in such case, one interpretation would render the grant inoperative, and the other would give it force and effect, the latter, if within a reasonable construction of the terms employed, should be adopted.¹

§ 247. It often becomes necessary to distinguish, in these cases of contract created by charter, between those provisions which are matters of contract, and those which impose penalties or forfeitures for the non-performance of duties or obligations embraced in the act; for while, as between individuals, a forfeiture is a matter of contract, because contract is the only mode in which one person can become liable to pay a penalty to another for a breach of duty, or the failure to perform an obligation, yet in legislative proceedings the construction is otherwise, and a forfeiture is always to be regarded as a punishment inflicted for a violation of a duty enjoined upon the party by law. And, therefore, where the legislature of Maryland provided by an act that a railroad company should locate their road in a particular manner, and in default of such location should forfeit a certain sum to

¹ *Mills v. St. Clair County*, 8 Howard, 569, 581; *The Richmond, &c., Railroad Company v. The Louisa Railroad Company*, 13 Howard, 71, 78, 83.

the state for the use of one of its counties, and afterwards repealed so much of the act as required that location, and released and remitted the penalty, and directed the discontinuance of any suit brought to recover it, it was held that the assent of the company to the first act as a supplemental charter did not make the money a matter of contract, but that it was a penalty imposed as a matter of state policy, which the state, on a change of policy, had the power to remit, and that the county had no interest separate from the rest of the state which could be enforced through the contract of the supplemental charter.¹

§ 248. How far it is in the power of a state, by repeal of the charter of a corporation, or any of its provisions, to affect the contracts of the corporation, or those of the state created by the charter, is also a question that has given rise to much discussion. In 1836, the legislature of the State of Arkansas chartered a bank, the whole of the capital of which belonged to the state. The charter provided that the bills and notes of the bank should be received in payment of all the dues to the state. In 1845, this portion of the charter was repealed. The Supreme Court of the United States held, that the undertaking of the state to receive the notes of the bank constituted a contract between the state and the holders of the notes, and that the repeal of this provision of the charter could not affect the right of the holder of notes, issued before the repeal, to tender them in payment of a judgment recovered by the State, whether the holder had them in his possession prior to the repeal or not.² But, where the state had sold lands which it held in trust for a seminary, and upon the terms that the purchaser should pay in specie or its equivalent, it was held that the purchaser could not claim the right to pay in notes of the bank, both upon the ground that the fund was a trust in the hands of the state, and could not be considered, within the charter of the bank, as a debt

¹ The State of Maryland, &c., *v.* The Baltimore and Ohio Railroad Company, 3 Howard, 534.

² Woodruff *v.* Tropnall, 10 Howard, 190.

due to the state, and upon the ground that by the condition of the sale, the notes of the bank were excluded.¹

§ 249. Another very interesting and important question that has arisen in reference to the contracts of a state, is, whether the obligation of a contract, created by charter or grant of a state, extends to what is called the power of "eminent domain;" so that the property of a corporation, acquired under the grant, or its franchise, cannot be taken for public uses, by the exercise of that power. With respect to the property acquired by a corporation under a grant of the power of eminent domain, as in the case of turnpikes, railroads, toll-bridges, and the like, it has been very strongly contended that when once exercised, the power has exhausted itself on the subject; that nothing remains but the contract of the state with the corporation; that is, that the erection shall be sustained by the corporation for public use, and compensation be received therefor by the receipt of tolls or passage-dues; and that the contract is both impaired and abolished by the state, by again exercising the power of eminent domain on the same subject. With regard to the franchise, it has been contended that it is not property which can be the subject-matter of the eminent domain; that it is created by and exists in the grant alone, which is a contract that the corporators shall exercise a portion of the prerogative or sovereignty of the state; and that when it is taken away, the contract is of necessity extinguished and destroyed. But the Supreme Court of the United States have denied both of these positions. They have held, that in all contracts, whether made between a state and individuals, or between individuals only, there enter conditions which do not arise out of the literal terms of the contract itself; that one of these conditions is the law, whether of nature, of nations, or of the community to which the parties belong, as either may be applicable to the subject; and that the contract is made with tacit reference, and in subordination to this law,

¹ *Paup v. Drew*, 10 Howard, 218; *Trig v. Drew*, *Ibid*, 224.

which imposes an inherent and paramount condition; that a contract between the government and a citizen is necessarily made with reference to the right of eminent domain; and, consequently, that the state has not contracted to forbear the exercise of this power in respect to the property of the corporation; that the property and rights which constitute the subject of the grant, being all held, like the property and rights of property of an individual, subject to the power of eminent domain, by the necessary conditions of the contract, may be taken under that power, and that the franchise is not distinguishable in this respect from the property of the corporation.¹

¹ The West River Bridge Company v. Dix, 6 Howard, 507, 529. Mr. Justice Daniel, who delivered the opinion of a majority of the court, said:—

“In considering the question propounded in these causes, there can be no doubt, nor has it been doubted in argument on either side of this controversy, that the charter of incorporation granted to the plaintiffs in 1793, with the rights and privileges it declared or implied, formed a contract between the plaintiffs and the State of Vermont, which the latter, under the inhibition in the tenth section of the first article of the Constitution, could have no power to impair. Yet this proposition, though taken as a postulate on both sides, determines nothing as to the real merits of these causes. True, it furnishes a guide to our inquiries, yet leaves those inquiries still open, in their widest extent, as to the real position of the parties with reference to the state legislation or to the Constitution. Following the guide thus furnished us, we will proceed to ascertain that position. No state, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed, that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the *eminent domain* of the state, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise.

“The Constitution of the United States, although adopted by the

§ 250. The case in which the power of a state to resume or extinguish a franchise, by the exercise of the eminent

sovereign states of this Union, and proclaimed in its own language to be the supreme law for their government, can, by no rational interpretation, be brought to conflict with this attribute in the states; there is no express delegation of it by the Constitution; and it would imply an incredible fatuity in the states, to ascribe to them the intention to relinquish the power of self-government and self-preservation. A correct view of this matter must demonstrate, moreover, that the right of eminent domain in government in no wise interferes with the inviolability of contracts; that the sanctimonious regard for the one is perfectly consistent with the possession and exercise of the other.

"Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body, organized in such mode, or exerted in such way as the community or state may have thought proper to ordain. It can rest on no other foundation, can have no other guarantee. It is owing to these characteristics only, in the original nature of tenure, that appeals can be made to the laws, either for protection or assertion of the rights of property. Upon other hypothesis, the law of property would be simply the law of force. Now it is undeniable, that the investment of property in the citizen by the government, whether made for a pecuniary consideration, or founded on conditions of civil or political duty, is a contract between the state, or the government acting as its agent, and the grantee; and both the parties are bound in good faith to fulfil it. But into all contracts, whether made between states and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed to be known and recognised by all, and binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract effected by it, but recognises its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the Constitution can scarcely, by the greatest violence of construction, be made applicable to the enforcing of the terms or necessary import of a contract; the lan-

domain, was thus affirmed not to be within the provision of the Constitution of the United States respecting the obliga-

guage and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof. It, then, being clear that the power in question not being within the purview of the restriction imposed by the tenth section of the first article of the Constitution, it remains with the states to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall be deemed commensurate with public necessity. So long as they shall steer clear of the single predicament denounced by the Constitution—shall avoid interference with the obligation of contracts—the wisdom, the modes, the policy, the hardship of any exertion of this power, are subjects not within the proper cognizance of this court. This is, in truth, purely a question of power; and, conceding the power to reside in the state government, this concession would seem to close the door upon all further controversy in connexion with it. The instances of the exertion of this power, in some mode or other, from the very foundation of civil government, have been so numerous and familiar, that it seems somewhat strange at this day to raise a doubt or question concerning it. In fact the whole policy of the country, relative to roads, mills, bridges, and canals, rests upon this single power, under which lands have always been condemned; and without the exertion of this power, not one of the improvements just mentioned could be constructed. In our country, it is believed that the power was never, or, at any rate, rarely, questioned, until the opinion seems to have obtained, that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of a citizen; an opinion which must be without any grounds to rest upon, until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being is less. For, as a question of the power to appropriate to public uses the property of private persons, resting upon the ordinary foundations of private right, there would seem to be room neither for doubt or difficulty. A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes, namely, that of the right in private persons, in the use or enjoyment of their private property, to control and actually prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a fran-

tion of contracts, was a case where the legislature of Vermont had, in 1795, incorporated a company for the purpose

chise which can class it higher, or render it more sacred than other property. A franchise is property, and nothing more; it is incorporeal property, and is so defined by Justice Blackstone, when treating, in his second volume, ch. 3, p. 20, of the Rights of Things. It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment. Vide Bl. Comm., vol. iii. ch. 16, p. 236, as to injuries to this description of private property, and the remedies given for redressing them. A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them, granted by the authority of the state, we regard as occupying the same position, with respect to the paramount power and duty of the state to promote and protect the public good, as does the right of the citizen to the possession and enjoyment of his land under his patent or contract with the state, and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the Constitution, and no violation of a contract. The power of a state, in the exercise of eminent domain, to extinguish immediately a franchise it had granted, appears never to have been directly brought here for adjudication, and consequently has not been heretofore formally propounded from this court; but in England, this power, to the fullest extent, was recognised in the case of the Governor and Company of the Cast Plate Manufacturers *v.* Meredith, 4 Term Reports, 794; and Lord Kenyon, especially in that case, founded solely upon this power the entire policy and authority of all the road and canal laws of the kingdom.

"The several state decisions cited in the argument, from 3 Paige's Chancery Reports, p. 45; from 23 Pickering, p. 361; from 17 Connecticut Reports, p. 454; from 8 New Hampshire Reports, p. 398; from 10 New Hampshire Reports, p. 371, and 11 New Hampshire Reports, p. 20, are accordant with the decision above-mentioned, from 4 Durnford and East, and entirely supported by it. One of these state decisions, namely, the case of the Enfield Toll-Bridge Company *v.* The Hartford and New Haven Railroad Company, 17 Connecticut Reports, places the principle asserted in an attitude so striking, as seems to render that case worthy of a separate notice. The legislature of Connecticut, having previously incorporated the Enfield Bridge Company, inserted in a charter subsequently granted by them to the Hartford and Springfield Railroad Company, a provision in these words: 'That nothing therein contained shall be construed to prejudice or impair any of the rights now vested in the Enfield Bridge Company.' This provision, comprehensive as its language may seem to be, was decided by the Supreme Court of the state as not

of building and maintaining a toll-bridge; and long afterwards, by certain proceedings under the general laws of the state, enacted in 1839, a public road was laid out between certain termini, passing over and upon the plaintiff's bridge, and thus converting it into a free public highway: compensation being assessed and awarded to them for this appropriation of their property, and for the consequent extinguishment of their franchise. The charter of incorporation had confined the plaintiff's right of erecting and maintaining a toll-bridge to a particular spot, directing it to be where a road was directed to be re-surveyed by an act passed at the same time. It is difficult to be satisfied with

embracing any exemption of the Bridge Company from the legislative power of eminent domain, with respect to its franchise, but to declare this, and this only,—that notwithstanding the privilege of constructing a railroad from Hartford to Springfield in the most direct and feasible route, granted by the latter charter, the franchise of the Enfield Bridge Company should remain as inviolate as the property of other citizens of the state. These decisions sustain clearly the following positions, comprised in this summary given by Chancellor Walworth, 3 Paige's Reports, p. 73, where he says, that 'notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have the right to resume the possession of the property in the manner directed by the Constitution and laws of the state, whenever the public interest requires it. This right of resumption may be exercised not only where the safety, but also where the interest, or even the expediency of the state is concerned.' In these positions, containing no exception with regard to property in a franchise (an exception which we should deem to be without warrant in reason), we recognise the true doctrines of the law as applicable to the cases before us. In considering the question of constitutional power,—the only question properly presented upon these records,—we institute no inquiry as to the adequacy or inadequacy of the compensation allowed to the plaintiffs in error for the extinguishment of their franchise; nor do we inquire into the conformity between the modes prescribed by the statutes of Vermont and the proceedings which actually were adopted in the execution of those statutes; these are matters regarded by this court as peculiarly belonging to the tribunals designated by the state for the exercise of her legitimate authority, and as being without the provisions assigned to this court by the Judiciary Act."

the reasoning employed by any of the learned judges in this case.¹ The ground upon which the decision was placed, by a majority of the court, was that above stated; and it rests, in substance, upon the position that, as the power of eminent domain is part of the fundamental law of the state, applicable to all property, the contract by which a franchise is created must be held to be made with reference to this known and universal power of the government, and upon the condition that it is to be exercised when occasion calls for it. But, it may be respectfully suggested that what was extinguished or taken away, in this case—the franchise itself—was the thing created by the contract, and the right to enjoy which was the thing stipulated; that the case differs from that of the Charles River and Warren bridges, in this, that in the latter case the value only of the franchise was impaired, but the franchise itself was not taken or extinguished; and that to hold that the subject-matter of its grant may be taken or extinguished by the state, under its power of eminent domain, when it cannot be resumed by the law-making power alone, without touching the obligation of the contract, is to hold that the right of the eminent domain enters into the contract, as one of its conditions, while the ordinary legislative power is excluded from it.²

¹ See *post*, note 2.

² In *Terret v. Taylor*, 9 Cranch, 43, 51, the Supreme Court said: "A *private* corporation, created by the legislature, may lose its franchises by a *misuser* or a *nonuser* of them; and they may be resumed by the government under a judicial judgment, upon a *quo warranto*, to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. Upon a change of government, too, it may be admitted that such exclusive privileges, attached to a private corporation, as are inconsistent with the new government, may be abolished. In respect, also, to *public* corporations, which exist only for public purposes, such as counties, towns, cities, &c., the legislature may, under proper limitations, have a right to change, modify, enlarge, or restrain them, securing, however, the property for the uses of those for whom and at whose expense it was originally purchased. But, that the legislature can repeal statutes creating private corporations, or confirming to them,

And this we understand to be the view of the court ; for it is said that the power of eminent domain is paramount to all private rights vested under the government, and, moreover, that the grant of a franchise is made with reference to it as 'an essential and inseparable condition,' growing out of the higher authority of the paramount law of the state. Now, this broad and very important question, whether and to what extent, the law of the state enters into and forms part of the obligation of a contract, by tacit reference or presumption, so as to regulate or fix the stipulations of the parties upon points on which the contract does not expressly speak, is a question that has not received so full and satisfactory an elucidation, in our constitutional discussions, as to warrant all the conclusions that may follow from a denial or affirmance of the general proposition. That the law which regulates or vests in the state the power of eminent domain, or the power itself, is of a more high or sacred character than any other law on which any of the other powers of government depend, or than those other powers themselves, so that it may be supposed to be peculiarly in the contemplation of the parties to such a grant, while the ordinary legislative power is not, it is difficult to affirm. It is difficult to see why a state can resume or destroy the subject of its grant, by a legislative act, which involves the exercise of the power of eminent domain, when it cannot do it by a simple repeal of the grant under the legislative power, upon the ground that the contract in the grant is made upon the condition that the one power may be exer-

property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit ; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the Constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine."

cised, and that the other may not be. All the powers of government are held in trust for the public, and all are equally to be presumed to be exercised for public purposes and objects. The simple repeal of a charter of incorporation, or other legislative grant, may be as much for the public convenience or necessity, as the extinguishment of the franchise by an act which takes it, under the power of eminent domain, for public uses; and when the charter is silent with regard to the exercise of both powers, it is difficult to see why one is within the obligation of the contract and the other is not, upon any notion of a tacit reference by the parties, through which the state obtains a reservation of power in one form, which it does not possess in another. The real question would seem to be, Has not the state, by creating a franchise, stipulated that it shall continue to exist and be enjoyed, as against *all* the legislative powers of government, and against all other powers, except those which rest upon the *salus populi suprema lex*? That there is a distinction between the franchise of a corporation and its property, in respect to the contract of the state and the corporators, as including or excluding any of the powers of government by its obligation, would seem to be clear, from the fact that the franchise is created by the grant, and its existence and enjoyment constitute the thing stipulated; whereas the property, however acquired, is only the means by which the franchise is exercised and enjoyed. Whether the franchise itself can be resumed, or destroyed, or extinguished, by the exercise of any merely legislative power, whether in the right of eminent domain, or in any other mode of promoting the public convenience, must depend, it is suggested, upon the great question how far and in what sense the existing law, whether fundamental, natural, or positive, enters into a contract. A further discussion of this and some of the other questions involved, might, it is conceived, lead to other conclusions as to the power of a state to take for public uses the franchise of a corporation,

than those which at present constitute the doctrine of the court.¹

§ 251. But, however this may be, it would seem to be clear, as is settled by a subsequent case, that the mere abuse of the power of eminent domain, by taking more land than is needful for the easement intended to be created, although the party whose land is taken holds it by patent from the state, is not a violation of a contract, within the sense and meaning of the Constitution of the United States, to be redressed under the 25th section of the Judiciary Act.²

§ 252. In this connexion, also, we have to notice the distinction between laws which impair the obligation of contracts, and laws which operate retrospectively, or divest vested rights, and yet do not impair the obligation of a contract. Retrospective laws, however unjust, are forbidden to the states by the Constitution of the United States, only when they impair the obligation of contracts, or, in criminal

¹ The differences of opinion entertained by some of the learned judges, who concurred in this decision, would seem to justify the suggestion, that the question involved in the case of *The West River Bridge Company* has not been so satisfactorily disposed of, as not to admit of its being again presented to the court, should occasion require.

Mr. Justice McLean did not adopt the reasoning of the majority; but he held that the power acts upon the property, and not upon the contract; that in the case at bar, the property of the corporation being taken, the franchise was of no value. He admitted that the state could not take the franchise alone, without taking the property. Mr. Justice Woodbury held that the franchise itself could be taken only "when its further exercise is inconsistent or incompatible with the highway to be laid out," or "where a clear intent is manifest in the laws, that one corporation and its uses shall yield to another, or another public use, under the supposed superiority of the latter and the necessity of the case." He stated many other limitations of his assent to the decision. Mr. Justice Wayne dissented from the opinion of the majority. It is quite evident that a re-examination of the question is needed. But the point has been again affirmed in *The Richmond, &c. Railroad v. The Louisa Railroad*, 13 Howard, 71.

² *Mills v. St. Clair County*, 8 Howard, 569, 584.

cases, where they are *ex post facto*. If they fall under neither of these designations, the question of their validity is to be decided wholly by the provisions of the state constitution, and in the state tribunals. Thus, where the legislature of Connecticut, in 1795, passed a resolve, setting aside a decree of a court of probate disapproving of a will, and granted a new hearing; it was held, that the resolve, not being against any constitutional principle in that state, was valid; and that the will, which was approved upon the new hearing, was conclusive as to the rights obtained under it.¹ So, too, there is a clear distinction between a law which operates to create a contract between parties, where none previously existed, and a law which impairs the obligation of a contract. Thus, where the legislature of Pennsylvania, after a decision of the Supreme Court of the state declaring that a contract between certain persons was void, and consequently that the relation of landlord and tenant did not subsist between them, passed an act declaring contracts of that nature valid, and that the relation of landlord and tenant should exist and be held effectual in them, the Supreme Court of the United States held, that a law which gives validity to a void contract, cannot be said to impair its obligation.² In like manner, where the real estate of a feme

¹ *Calder v. Bull*, 3 Dallas, 386.

² *Satterlee v. Mathewson*, 2 Peters, 380, 411. In this case, Mr. Justice Washington, delivering the opinion of the court, said, "Is the act which is objected to repugnant to any provision of the Constitution of the United States? It is alleged to be so by the counsel for the plaintiff in error, for a variety of reasons; and particularly, because it impairs the obligation of the contract between the State of Pennsylvania and the plaintiffs who claim title under her grant to Wharton, as well as of the contract between Satterlee and Mathewson; because it creates a contract between parties where none previously existed, by rendering that a binding contract which the law of the land had declared to be invalid; and because it operates to divest and destroy the vested rights of the plaintiff. Another objection relied upon is, that in passing the act in question, the legislature exercised those functions which belong exclusively to the judicial branch of the government.

"Let these objections be considered. The grant to Wharton bestowed

covert had been conveyed by deed not duly acknowledged according to the laws of Pennsylvania, and the legislature

upon him a fee simple estate in the land granted, together with all the rights, privileges, and advantages which, by the laws of Pennsylvania, that instrument might legally pass. Were any of those rights, which it is admitted vested in his vendee or alienee, disturbed or impaired by the act under consideration? It does not appear from the record, or even from the reasoning of the judges of either court, that they were in any instance denied, or even drawn into question. Before Satterlee became entitled to any part of the land in dispute under Wharton, he had voluntarily entered into a contract with Mathewson, by which he became his tenant, under a stipulation that either of the parties might put an end to the tenancy at the termination of any one year. Under this new contract, which, if it was ever valid, was still subsisting and in full force at the time when Satterlee acquired the title of Wharton, he exposed himself to the operation of a certain principle of the common law, which estopped him from controverting the title of his landlord, by setting up a better title to the land in himself, or one outstanding in some third person.

"It is true, that the Supreme Court of the state decided, in the year 1825, that this contract, being entered into with a person claiming under a Connecticut title, was void; so that the principle of law which has been mentioned did not apply to it. But the legislature afterwards declared by the act under examination, that contracts of that nature were valid, and that the relation of landlord and tenant should exist and be held effectual, as well in contracts of that description, as in those between other citizens of the state.

"Now, this law may be censured, as it has been, as an unwise and unjust exercise of legislative power, as retrospective in its operation; as the exercise, by the legislature, of a judicial function; and as creating a contract between parties where none previously existed. All this may be admitted; but the question which we are now considering is, does it impair the obligation of the contract between the state and Wharton, or his alienee? Both the decision of the Supreme Court, in 1825, and this act, operate, not upon that contract, but upon the subsequent contract between Satterlee and Mathewson. No question arose, or was decided, to disparage the title of Wharton, or of Satterlee as his vendee. So far from it, that the judge stated in his charge to the jury, that if the transactions between John F. Satterlee and Elisha Satterlee were fair, then the elder title of the defendant must prevail, and he would be entitled to a verdict. We are then to inquire whether the obligation of a contract between Satterlee and Mathewson was impaired by this statute?

"The objections urged at the bar, and the arguments in support of

afterwards passed an act making such conveyances valid, notwithstanding informalities in the acknowledgment of the

them, apply to that contract, if to either. It is that contract which the act declared to be valid, in opposition to the decision of the Supreme Court; and admitting the correctness of that decision, it is not easy to perceive how a law which gives validity to a void contract, can be said to impair the obligation of that contract. Should a statute declare, contrary to the general principles of law, that contracts founded upon an illegal or immoral consideration, whether in existence at the time of passing the statutes, or which might hereafter be entered into, should nevertheless be valid and binding upon the parties; all would admit the retrospective character of such an enactment, and that the effect of it was to create a contract between parties where none had previously existed. But it surely cannot be contended, that to create a contract, and to destroy or impair one, mean the same thing.

"If the effect of the statute in question be not to impair the obligation of either of these contracts, and none other appear on this record, is there any other part of the Constitution of the United States to which it is repugnant? It is said to be retrospective. Be it so; but retrospective laws which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument.

"All the other objections which have been made to this statute admit of the same answer. There is nothing in the Constitution of the United States which forbids the legislature of a state to exercise judicial functions. The case of *Ogden v. Blackledge* came into this court from the Circuit Court of the United States, and not from the Supreme Court of North Carolina; and the question whether the Act of 1797, which partook of a judicial character, was repugnant to the Constitution of the United States, did not arise, and consequently was not decided. It may safely be affirmed, that no case has ever been decided in this court, upon a writ of error, to a state court, which affords the slightest countenance to this objection. The objection, however, which was most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was, that the effect of this act was to divest rights which were vested by law in *Satterlee*. There is certainly no part of the Constitution of the United States which applies to a state law of this description; nor are we aware of any decision of this, or of any circuit court, which has condemned such a law upon this ground; provided its effect be not to impair the obligation of a contract: and it has been shown, that the act in question has no such effect upon either of the contracts which have been before mentioned.

"In the case of *Fletcher v. Peck*, it was stated by the Chief Justice,

deed, it was said, that if it were true that the act divested the vested right of the heirs-at-law of the wife to the land, it was not on that account a violation of the Constitution of the United States, which prohibits not retrospective laws generally, but only *ex post facto* laws, which are penal and criminal laws; and that so far from impairing any contract, the act assumed the title of the *femes covert* to be good, and sought to give effect to their contracts.¹

§ 253. It is important, however, in dealing with this distinction as to laws which divest vested rights, to observe that if the rights have vested under a contract, or grant of a state, a law which impairs or takes them away, impairs the obligation of a contract, since that obligation necessarily includes an undertaking not to resume or interfere with the rights granted. Thus, it has been said, that when a law is

that it might be well doubted, whether the nature of society and of government do not prescribe some limits to the legislative power; and he asks, 'if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?' It is nowhere intimated in that opinion that a state statute which divests a vested right is repugnant to the Constitution of the United States, and the case in which that opinion was pronounced was removed into this court by writ of error, not from the supreme court of a state, but from a circuit court.

"The strong expressions of the court upon this point, in the cases of *Vanhorne's lessee v. Dorance*, and *The Society for the Propagation of the Gospel v. Wheeler*, were founded expressly on the constitution of the respective states in which these cases were tried.

"We do not mean in any respect to impugn the correctness of the sentiments expressed in those cases, or to question the correctness of a circuit court sitting to administer the laws of a state, in giving to the constitution of that state a paramount authority over a legislative act passed in violation of it. We intend to decide no more than that the statute objected to in this case is not repugnant to the Constitution of the United States, and that unless it be so, this court has no authority, under the 25th section of the Judiciary Act, to re-examine and to reverse the judgment of the Supreme Court of Pennsylvania in the present case."

¹ *Watson v. Mercer*, 8 Peters, 88.

in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights;¹ and in the case of the Charles River and Warren Bridges, it was said by the court that the plaintiffs must place themselves upon the ground of contract, and show that the exclusive right which they claimed was acquired by contract with the state.² When, therefore, it is said, that a state law which divests vested rights may not be corrected in the Supreme Court of the United States, under the 25th section of the Judiciary Act, it must be understood with the further qualification that the law does not impair the obligation of a contract. If the rights are given or created by contract; if they spring from a grant which has ceded them, and which imports an obligation to leave them unimpaired, the very clause of the Constitution is violated, by a law which impairs or takes them away. But if they are not ceded by contract, or created by its terms, if they spring merely from the existing law, or are collateral only to the contract, without being part of its provisions, they are not protected by the obligation of the contract. Thus, for example, a right to imprison for debt on a contract is a right derived wholly from the existing law of remedy, and forms no part of the contract; and therefore a law which takes it away does not violate the obligation of a contract.³

§ 254. In the same way, a state law which makes the younger of two conflicting titles, derived from the same grantor, paramount to the elder, if it be first recorded, does not impair the obligation of a grant by which the state conveyed the land to the grantor, for the contract of the state does not import an obligation not to alter the law on which the validity of titles depends.⁴

§ 255 a. We come now to examine the obligation of contracts made by individuals, when impaired by state legislation. And

¹ *Fletcher v. Peck*, 6 Peters, 87, 135.

² *Ante*.

³ *Mason v. Haile*, 12 Wheaton, 370, 378.

⁴ *Jackson v. Lamphire*, 3 Peters, 280.

it is upon this branch of the subject that the most profound discussions have taken place, as to what constitutes the obligation of a contract, and the mode in which it may be impaired; although, it must be admitted, those discussions have not exhausted the subject, and have not always carried conviction to all the learned minds, whose high duty it has been to determine those questions.

§ 255. The class of laws, which have given rise to the most serious conflicts of opinion on this subject, have been the state bankrupt, or insolvent laws, operating upon contracts made before or after their passage. The question which they have presented, respecting the inviolability of contracts, has been complicated with another growing out of the complex system of the state and the federal jurisdictions. The cases that have been litigated have sometimes presented contracts made in other states than those where the discharge has been obtained and pleaded under a state law, and the decisions have sometimes turned upon the question to which this circumstance gives rise, respecting the power of the states to affect the right of action accruing to citizens of other states by such contracts. Still, the naked question concerning the unconstitutionality of state bankrupt or insolvent laws, upon the ground that they impair the obligations of contracts entered into after their passage, has, upon one occasion, been answered in the negative by a majority of the Supreme Court of the United States. But a careful examination of the cases will show that the subject is still left in a distressing conflict of opinions, and requires to be re-examined upon principle and analogy.

§ 256. In the case of *Sturgis v. Crowninshield*, the law in question, passed by the State of New York, liberated the person of the debtor, and discharged him from all liability from any debt previously contracted, on his surrendering his property in the manner it prescribed. The contract was made in New York, before the act granting the discharge was passed, and the suit, in which the dis-

charge under that law was pleaded, was brought in the Circuit Court of the United States for the Massachusetts District. The opinion of the Supreme Court of the United States affirmed the power of the States to pass bankrupt or insolvent laws, when the same power is not exercised by Congress at the same time, provided they do not impair the obligation of contracts; and it also affirmed the doctrine, that the prohibition of the Constitution, with regard to contracts, was a general provision designed to establish a principle, namely, that contracts should be inviolable; and that any law which discharged a contract without performance, violates its obligation. At the same time, the decision was confined to the case under consideration, that is to say, where the contract was made before the law, and where the creditor sued in the Circuit Court of the United States, and in another state than that whose law was pleaded in discharge of the contract.¹ In the next case, which followed immediately, the same principle was applied to a case where the contract was made after the state law was passed, and where it was made in South Carolina, notwithstanding the suit was brought in the Circuit Court of the United States for Louisiana, in which state the law was passed, and the discharge obtained.² In the next case, the same principle was applied to a debt contracted previous to the discharge, where the law under which it was granted was passed in the state where the contract was made, and where the parties continued to reside, at the time when the suit was brought, and where the suit was brought in the courts of the same state.³

¹ *Sturges v. Crowninshield*, 4 Wheaton, 122, 191, 207.

² *McMillan v. McNeal*, 4 Wheaton, 209, 212. In this case, Mr. Chief Justice Marshall, delivering the opinion of the court said that "the case was not distinguishable in principle from the case of *Sturges v. Crowninshield*;" and "that the circumstances of the state law, under which the debt was attempted to be discharged, having been passed before the debt was contracted, made no difference in the application of the principle."

³ *Farmers' and Mechanics' Bank of Pennsylvania v. Smith*, 6 Wheaton, 131.

§ 257. Thus far, therefore, the decisions affirm the following propositions, 1. That a state law which discharges a debtor from a contract made previous to its passage, whether the contract is made in or out of the state, is unconstitutional in its application to such contract; 2. That a state law, which undertakes to discharge a contract made after its passage, and made out of the state, cannot be pleaded in bar to an action, although that action is brought in the state where the discharge was obtained. Whether it was not the intention of the court, in *Sturges v. Crowninshield*, to affirm the general principle, that no contract, whether made before or after the passage of the law, can be discharged by a state insolvent law, upon the ground that the obligation of the contract is inconsistent with the idea of a discharge from the promise it contains, might perhaps admit of question. Certain it is, that the reasoning of the court leads to this result. But it appears that it was afterwards made known, that the reasoning of the Chief Justice in this case was adopted by the other judges, only as far as it went to establish the principle in its application to a contract made before the passage of the law, and where the suit was brought in another state than that where the law was passed. Such was the explanation given in the case of *Ogden v. Saunders*,¹ which followed that of the *Mechanics' Bank v. Smith*.

§ 258. The case of *Ogden v. Saunders* was an action brought in the District Court of the United States for Louisiana, by a citizen of Kentucky against a citizen of Louisiana, upon certain bills of exchange accepted by the latter at New York, where he then resided, and where he obtained a discharge under the insolvent law of New York, enacted before the acceptance of the bills, which discharge was pleaded in bar of the suit. The case, in its first aspect, presented the broad question, whether an insolvent law of a state, as applied to contracts made after its enactment,

¹ See the explanation given by the Chief Justice in *Ogden v. Saunders*, 12 Wheaton, 333.

impairs their obligation, in the sense of the Constitution, by releasing the person of the debtor and his future acquisitions of property from liability under the contract. A majority of the court held (and judgment was entered accordingly), that such a law does not impair the obligation of contracts entered into subsequent to its passage, between citizens of the same state, under whose law the discharge is obtained, and when the discharge is pleaded in the courts of that state.¹ The cause was again argued, as to the effect of such a discharge in respect to a contract made with a citizen of another state, where the certificate is pleaded in the courts of another state, or of the United States; and another majority of the court held that the discharge would, in such a case, be no bar to the action.²

§ 259. The next case was that of *Mason v. Haile*, in

¹ The majority on this question consisted of Judges Washington, Johnson, Thompson, and Trimble; the minority, of Mr. Chief Justice Marshall, and Judges Story and Duvall. 12 Wheaton, 213, 254, 271, 292, 313, 332.

² Upon this question, the majority consisted of the Chief Justice, and Judges Johnson, Duvall, and Story; the minority, of Judges Washington, Thompson, and Trimble. Ibid. 358, 369. In *Boyle v. Zacharie*, 6 Peters, 635, 642, Mr. Justice Story, delivering the opinion of the court, stated that the ultimate opinion delivered by Mr. Justice Johnson in *Ogden v. Saunders* (meaning that upon the effect of an insolvent discharge on contracts made out of the state), was concurred in by the three judges who were in the minority on the general question of the constitutionality of state insolvent laws. He added, that "so far as decisions upon the subject of state insolvent laws have been made by this court, they are to be deemed final and conclusive." In this, however, it would seem that he referred to the questions decided in the final opinion of Judge Johnson, in *Ogden v. Saunders*; for on an inquiry being made at the bar, before *Boyle v. Zacharie* was argued, Chief Justice Marshall, referring to the same opinion said, "Whatever principles are established in *that opinion*, are to be considered no longer open for controversy, but the settled law of the court." See 6 Peters, 348. *Boyle v. Zacharie* was the case of a contract made by a citizen of Maryland, in Louisiana, and the effect of a discharge obtained in Maryland presented the same question that was decided in the final opinion in *Ogden v. Saunders*.

which it was held that the condition of a bond for the jail limits in Rhode Island, which required the party to remain a true prisoner until "lawfully discharged," was not broken by his going at large under a discharge under the insolvent laws of the state, obtained from the proper court in pursuance of a resolve of the legislature, which discharged the party from all his debts, and from all imprisonment, arrest, and restraint of his person. But this was upon the ground that the law, so far as it operated upon the bond, was a law regulating the remedy, by taking away imprisonment for debt, and that so far as the bond could be regarded as a contract, a discharge by law from imprisonment was a "lawful discharge;" but the court regarded the bond not in the strict light of a contract, but as part of the process under which the prisoner was held, over which, according to the doctrine laid down in *Sturges v. Crowninshield*, the legislature has entire control.¹

§ 260. The doctrine finally established in *Ogden v. Saunders*, namely, that a discharge under a state insolvent law cannot affect a contract made by the debtor with a citizen of another state, was again affirmed in two subsequent cases, in the last of which it was applied to a contract made subsequently to the passage of the law.² In this latter case, however (*Cook v. Moffat*), although the point just stated was alone actually involved and decided, several of the judges expressed themselves with regard to the general question of the operation of state insolvent laws upon contracts, in a manner which shows that as great a diversity of views exists upon it now, as was found to exist when the question was first presented in the year 1819.

¹ *Mason v. Haile*, 12 Wheaton, 370. Mr. Justice Washington dissented, holding the bond to be strictly a private contract, entered into before the passage of the law, and, therefore, within the decision in *Sturges v. Crowninshield*.

² *Boyle v. Zacharie*, 6 Peters, 635, 641; *Cook v. Moffat*, 5 Howard, 295.

§ 261. There are, however, two cases previous to *Cook v. Moffat*, in which the court have gone a great way in the adoption of the doctrine that the existing law, *on the subject of remedy*, enters into and forms part of every contract, and that a law which takes away a right, given by the law in force at the time of the contract, to pursue a certain remedy, is a law impairing the obligation of the contract. One of them was the case of a law passed by the legislature of Illinois, subsequently to the execution of a mortgage, which declared that the equitable estate of the mortgagor should not be extinguished for twelve months after a sale under a decree in chancery, and which prevented any sale unless two-thirds of the amount at which the property had been valued by appraisers should be bid for it. The court held that the law of the state existing at the time when the mortgage was made, and which gave the mortgagee a right to a sale under a decree of a court of chancery that would extinguish the equitable interest of the mortgagor, made a part of the contract, and that a law which took it away violated the obligation of the contract.¹ Upon the same ground, that the

¹ *Bronson v. Kinzie*, 1 Howard, 311. The following is the reasoning of Mr. Chief Justice Taney, who delivered the opinion of the court: "As concerns the obligations of the contract upon which this controversy has arisen, they depend upon the laws of Illinois as they stood at the time the mortgage deed was executed. The money due was, indeed, to be paid in New York. But the mortgage given to secure the debt was made in Illinois for real property situated in that state, and the rights which the mortgagee acquired in the premises depended upon the laws of that state. In other words, the existing laws of Illinois created and defined the legal and equitable obligations of the mortgage contract.

"If the laws of the state passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in

existing law of the state on the subject of remedy upon a contract, enters into and forms part of the contract, so that

every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And, although a new remedy may be deemed less convenient than the old one, and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case it is prohibited by the Constitution.

"This subject came before the Supreme Court in the case of *Green v. Biddle*, decided in 1823, and reported in 8 Wheat. 1. It appears to have been twice elaborately argued by counsel on both sides, and deliberately considered by the court. On the part of the demandant in that case, it was insisted that the laws of Kentucky, passed in 1797 and 1812, concerning occupying claimants of land, impaired the obligation of the compact made with Virginia in 1789. On the other hand, it was contended that these laws only regulated the remedy, and did not operate on the right to the lands. In deciding the point, the court say: 'It is no answer that the Acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests.' And, in the opinion delivered by the court after the second argument, the same rule is reiterated in language equally strong (see pages 75,¹ 76, and 84).

¹ Nothing, in short, can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his rights to, and interest in, the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged; but it is impaired and rendered insecure, according to the nature and extent of such restrictions: 8 Wheat. 75.

the right to the remedy is thus made one of the rights of the contract, it was held that a law of the State of Illinois pro-

This judgment of the court is entitled to the more weight because the opinion is stated in the report of the case to have been unanimous; and Judge Washington, who was the only member of the court absent at the first argument, delivered the opinion of the second. We concur entirely in the correctness of the rule above stated. It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it. Blackstone, in his Commentaries on the Laws of England, 1 vol. 55, after having treated of the declaratory and directory parts of the law, defines the remedial in the following words:—

“‘The remedial part of the law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For, in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law. When, for instance, the declaratory part of the law has said that the field or inheritance which belonged to Titus’s father is vested by his death in Titus; and the directory part has forbidden any one to enter on another’s property without the leave of the owner; if Gaius, after this, will presume to take possession of the land, the remedial part of the law will then interpose its office, will make Gaius restore the possession to Titus, and also pay him damages for the invasion.’

“We have quoted the entire paragraph, because it shows, in a few, plain words, and illustrates by a familiar example, the connexion of the remedy with the right. It is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which the clause in the Constitution now in question mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it to suppose it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life. It was undoubtedly adopted as a part of the

viding that a sale shall not be made of property levied on under an execution, unless it will bring two-thirds of its valu-

Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the Constitution of the United States. And it would ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy, which would render this provision illusive and nugatory; mere words of form, affording no protection, and producing no practical result.

"We proceed to apply these principles to the case before us. According to the long-settled rules of law and equity in all of the states whose jurisprudence has been modelled upon the principles of the common law, the legal title to the premises in question vested in the complainant, upon the failure of the mortgagor to comply with the conditions contained in the proviso; and at law he had a right to sue for and recover the land itself. But, in equity, this legal title is regarded as a trust estate to secure the payment of the money; and, therefore, when the debt is discharged, there is a resulting trust for the mortgagor. *Conrad v. The Atlantic Insurance Company*, 1 Peters, 441. It is upon this construction of the contract, that courts of equity lend their aid either to the mortgagor or mortgagee, in order to enforce their respective rights. The court will, upon the application of the mortgagor, direct the reconveyance of the property to him, upon the payment of the money; and, upon the application of the mortgagee, it will order a sale of the property to discharge the debt. But, as courts of equity follow the law, they acknowledge the legal title of the mortgagee, and never deprive him of his right at law until his debt is paid; and he is entitled to the aid of the courts to extinguish the equitable title of the mortgagor, in order that he may obtain the benefit of his security. For this purpose, it is his absolute and undoubted right, under an ordinary mortgage deed, if the money is not paid at the appointed day, to go to the court of chancery, and obtain its order for the sale of the whole mortgaged property (if the whole is necessary), free and discharged from the equitable interest of the mortgagor. This is his right by the law of the contract; and it is the duty of the court to maintain and enforce it without any unreasonable delay.

"When this contract was made, no statute was passed by the state changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court; and it must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated. They were the laws of Illinois at the time, and, therefore, entered into the contract, and formed a part of it,

ation, according to the opinion of three householders, was unconstitutional and void in its application to pre-existing debts.¹

without any express stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem, by paying the money after the day limited in the deed, and before he was foreclosed by the decree of the court of chancery. Yet no one doubts his right or his remedy; for, by the laws of the state then in force, this right and this remedy were a part of the law of the contract, without any express agreement by the parties. So, also, the rights of the mortgagee, as known to the laws, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed a part of it; and any subsequent law, impairing the rights thus acquired, impairs the obligations which the contract imposed.

"This brings us to examine the statutes of Illinois which have given rise to this controversy. As concerns the law of February 19, 1841, it appears to the court not to act merely on the remedy, but directly upon the contract itself, and to engraft upon it new conditions injurious and unjust to the mortgagee. It declares that, although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable interest in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security, by rendering the property unsaleable for anything like its value. This law gives to the mortgagor, and to the judgment-creditor, an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the Constitution.

"The second point certified arises under the law of February 27, 1841. The observations already made in relation to the other act, apply with equal force to this. It is true that this law apparently acts upon the

¹ *McCracken v. Hayward*, 2 Howard, 608.

§ 262. Having stated the precise judicial position of this subject, a few suggestions may be here made, with reference

remedy, and not directly upon the contract; yet its effect is to deprive the party of his pre-existing right to foreclose the mortgage by a sale of the premises, and to impose upon him conditions which would frequently render any sale altogether impossible. And this law is still more objectionable, because it is not a general one, and prescribing the mode of selling mortgaged premises in all cases, but is confined to judgments rendered and contracts made prior to the 1st of May, 1841. The act was passed on the 27th of February in that year; and it operates mainly on past contracts and not on future. If the contracts intended to be affected by it had been specifically enumerated in the law, and these conditions applied to them, while other contracts of the same description were to be enforced in the ordinary course of legal proceedings, no one would doubt that such a law was unconstitutional. Here a particular class of contracts is selected, and encumbered with these new conditions; and it can make no difference, in principle, whether they are described by the names of the parties, or by the time at which they were made.

"In the case before us, the conflict of these laws with the obligations of the contract is made the more evident by an express covenant contained in the instrument itself, whereby the mortgagee, in default of payment, was authorized to enter on the premises and sell them at public auction, and to retain out of the money thus raised the amount due, and to pay the surplus, if any, to the mortgagor. It is impossible to read this covenant and compare it with the laws now under consideration, without seeing that both of these acts materially interfere with the express agreement of the parties contained in this covenant. Yet, the right here secured to the mortgagee is substantially nothing more than the right to sell, free and discharged of the equitable interest of Kinzie and wife, in order to obtain his money. Now, at the time this deed was executed, the right to sell, free and discharged of the equitable estate of the mortgagor, was a part of every ordinary contract of mortgage in the state, without the aid of this express covenant; and the only difference between the right annexed by law and that given by the covenant, consists in this: that in the former case, the right of sale must be exercised under the direction of the court of chancery, upon such terms as it shall prescribe, and the sale made by an agent of the court; in the latter, the sale is to be made by the party himself. But, even under this covenant, the sale made by the party is so far subject to the supervision of the court, that it will be set aside and a new one ordered, if reasonable notice is not given, or the proceedings be regarded, in any respect, as contrary to equity and justice. There is, therefore, in truth, but little material difference between the rights of the mortgagee with or without

to the principal question involved, namely, whether and to what extent, or in what sense, the existing law enters into and forms part of a contract. It is mainly upon the notion that contracts are made with a tacit reference to the laws in force at the time they are entered into, that the doctrine is maintained, which holds that such laws do not impair the obligation of contracts made subsequently to their enactment, and that statutes which essentially vary or repeal pre-existing laws, so as to give to either party rights materially different from those annexed to the contract by the law in force at its formation, are within the prohibition of the Constitution. But it is extremely difficult to make this doctrine consistent with itself. If, in a contract to pay a sum of money, for value received, that is absolute on its face, and that contains in its terms no condition whatever, there is an implied condition, that on the insolvency of the promisor, the promisee shall receive a less sum, and that the promisor shall be released from the promise as to all the residue, because the existing law enacts that on a surrender of their property insolvent debtors shall be discharged, it must be upon the ground that the obligation of the contract depends for its force upon the law of society, and ex-

this covenant. The distinction consists rather in the form of the remedy, than in the substantial right; and as it is evident that the laws in question invade the right secured by this covenant, there can be no sound reason for a different conclusion, where similar rights are incorporated by law into the contract, and form a part of it at the time it is made.

"Mortgages made since the passage of these laws must undoubtedly be governed by them; for every state has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale, for the payment of a debt, and may impose such conditions and restrictions upon the creditor as its judgment and policy may dictate. And all future contracts would be subject to such provisions; and they would be obligatory upon the parties in the courts of the United States, as well as in those of the state. We speak, of course, of contracts made and to be executed in the state. It is a case of that description that is now before us, and we do not think it proper to go beyond it."

But see the dissenting opinion of Mr. Justice McLean.

tends no farther than that law requires, and extends just as far as the sovereign power of society chooses to have it. If so, if the parties, when they enter into a contract, are supposed to contemplate just that extent of obligation which the legislative power of the community sees fit to have them assume, why is not the repealing or modifying power over the law equally within their contemplation, so as to make the extent of obligation exactly what the law makes it at the time of a breach of the promise? The reason that has usually been assigned for a distinction, is, that the law existing at the time when the contract is entered into fixes the rights of the parties, and determines what the one shall have a right to demand, and what the other shall be bound to perform; but if it does so, it is by means of a presumption that the parties, although the terms of their contract are express and absolute, made its obligation conditional, by tacitly annexing to it the provisions of the law. But when does this presumption begin to operate? Or, in other words, when is the law applicable to the contract, and when did the parties mean that it should operate upon it? Did they mean that the law should fix their rights before a breach of the terms of their contract had given rise to the inquiry of what implied conditions it embraced, or did they mean that their rights should be ascertained by the law existing at the time when a breach of the express and absolute promise makes it necessary to ascertain whether the coercive power of society intends to treat it as an express and positive obligation? There seems to be as good reason for holding the latter to have been their intention, as there is for maintaining that the former was alone contemplated. Indeed, if the law existing at the time a simple contract debt is incurred, fixes the extent and nature of the obligation, by the presumed reference of the parties to the rights which it gives, it cannot be repealed as to any contract made while it was in force.

§ 263. But the difficulty becomes more apparent, when we come to apply this doctrine to contracts purely conditional

or contingent, at their inception. Suppose the case of a contract to pay money, on the happening of a future event. A law affecting the entire promise of contracts may be in force at the time when such a contingent contract was entered into, and may be repealed before the money becomes due. Which law was applicable to the contract? Did the parties intend, if they intended any reference to the law, that their rights should be fixed by the law as it stood before any right to demand payment had been acquired, or did they mean that when the obligation had become perfect, its extent and force should be determined by the legislative will then applicable to the same class of obligations?

§ 264. These difficulties, it is believed, are not encountered, by the suggestion that a law professing to deal only with the remedy, may go so far as to render the contract worthless, by taking away the means of enforcing it. It is undoubtedly true, and has been admitted in all the reasoning on this subject, that while the legislature of a state has power to vary and modify the remedy upon contracts, if it takes away all remedy, so that the obligation of the contract cannot be satisfied, the obligation is impaired. But the question is, not whether some remedy, but whether the particular remedy existing at the time when the contract is made, is in the contemplation of the parties, as forming part of its stipulations, and determining the rights under it. It has not been denied, by those who have maintained that the existing law enters into the contract, that there is, as to the particular remedy in force at the making of the contract, a distinction between remedy and obligation, and that the legislature may act on the one, without impairing the other, provided some remedy is left, which will enable the party to enforce the obligation. If this be true, then the particular remedy cannot enter into the stipulations of the contract, and therefore I conceive that the question whether a particular law, which changes the remedy, touches the obligations of the contract, does not depend upon the adoption of the remedy

as a term of the contract, but upon the question whether the remedy afforded will satisfy the obligation of the contract, as ascertained by its terms, and the principles of interpretation properly applicable to them.¹

§ 265. Other illustrations of the jurisdiction conferred and regulated by the 25th section of the Judiciary Act will be found in the cases where the validity of a state law, on the ground of its repugnancy to some other provision of the Constitution, has been drawn in question. As, where the question has been whether a state law violated the provision of the Constitution which prohibits the states to issue "bills of credit;"² or where a state law was supposed to be in conflict with the power of Congress to regulate commerce;³ or to regulate the militia;⁴ or "to borrow money on the credit of the United States;"⁵ or to establish a bank for the fiscal operations of the government;⁶ or to employ officers for the purposes of the government upon a fixed compensation, not subject to deduction by the taxing power of the states.⁷ But in order to give jurisdiction under the 25th section of the Judiciary Act, the state law must be repugnant to some provision of the Constitution or laws of the United States, or some authority exercised under them. And, therefore, where a question arose in a state court whether an ordinance

¹ I have made these suggestions, not with a view to the full discussion of this difficult subject, but for the purpose of indicating the direction in which further inquiries may be prosecuted. It has, I confess, always appeared to me, that the reasoning of Chief Justice Marshall, in *Ogden v. Saunders*, so far as it deals with this question, whether an existing law forms part of a contract, is unanswerable.

² *Craig v. The State of Missouri*, 4 Peters, 410; *Briscoe v. The Commonwealth Bank of Kentucky*, 11 Peters, 257.

³ *Wilson v. The Black Bird Creek Company*, 2 Peters, 245; *Brown v. The State of Maryland*, 12 Wheaton, 419; *Gibbons v. Ogden*, 9 Wheaton, 1.

⁴ *Houston v. Moore*, 5 Wheaton, 1.

⁵ *Weston v. The City Council of Charleston*, 2 Peters, 449.

⁶ *McCulloch v. The State of Maryland*, 4 Wheaton, 316.

⁷ *Dobbins v. The Commissioners of Erie County*, 16 Peters, 435.

of the city authorities of New Orleans did not violate religious liberty, it was held that the Supreme Court of the United States could not take jurisdiction, since the Constitution of the United States makes no provision for protecting the citizens of the respective states in their religious liberties, but leaves such protection to the constitutions of the states, and since the Acts of Congress organizing the territory of Orleans, and adopting for it the provisions of the Ordinance of 1787, were superseded by the State Constitution of Louisiana.¹

¹ *Permoli v. The First Municipality of New Orleans*, 3 Howard, 589. In this case, Mr. Justice Catron delivering the opinion of the court, said:—

“As this case comes here on a writ of error to bring up the proceedings of a state court, before proceeding to examine the merits of the controversy, it is our duty to determine whether this court has jurisdiction of the matter.

“The ordinances complained of must violate the Constitution or laws of the United States, or some authority exercised under them; if they do not, we have no power by the 25th section of the Judiciary Act to interfere. The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the states. We must therefore look beyond the Constitution for the laws that are supposed to be violated, and on which our jurisdiction can be founded; these are the following Acts of Congress. That of February 20, 1811, authorized the people of the territory of Orleans to form a constitution and state government: by section 3, certain restrictions were imposed in the form of instructions to the convention that might form the constitution; such as that it should be republican; consistent with the constitution of the United States; that it should contain the fundamental principles of civil and religious liberty; that it should secure the right of trial by jury in criminal cases, and the writ of *habeas corpus*; that the laws of the state should be published, and legislative and judicial proceedings be written and recorded in the language of the Constitution of the United States. Then follows by a second proviso, a stipulation reserving to the United States the property in the public lands, and their exemption from state taxation, with a declaration that the navigation of the Mississippi and its waters shall be common highways, &c.

“By the Act of April 8, 1812, Louisiana was admitted according to

§ 266. In like manner, the precise question which gives jurisdiction to the Supreme Court of the United States,

the mode prescribed by the Act of 1811; Congress declared it should be on the conditions and terms contained in the third section of that act, which should be considered, deemed, and taken, as fundamental conditions and terms upon which the state was incorporated in the Union. All Congress intended was to declare in advance to the people of the territory, the fundamental principles their constitution should contain; this was every way proper under the circumstances; the instrument having been duly formed and presented, it was for the national legislature to judge whether it contained the proper principles, and to accept it if it did, or reject it if it did not. Having accepted the constitution and admitted the state 'on an equal footing with the original states in all respects whatever,' in express terms, by the Act of 1812, was concluded from assuming that the instructions contained in the Act of 1811 had not been complied with. No fundamental principles could be added by way of amendment, as this would have been making part of the state constitution; if Congress could make it in part, it might, in the form of amendment, make it entire. The conditions and terms referred to in the Act of 1812 could only relate to the stipulations contained in the second proviso of the Act of 1811, involving rights of property and navigation, and, in our opinion, were not otherwise intended. The principal stress of the argument for the plaintiff in error proceeded on the Ordinance of 1787. The Act of 1805, ch. 83, having provided, that from and after the establishment of the government of the Orleans territory, the inhabitants of the same should be entitled to enjoy all the rights, privileges, and advantages secured by said ordinance, and then enjoyed by the people of the Mississippi territory. It was also made the frame of government, with modifications.

"In the ordinance there are terms of compact declared to be thereby established between the original states, and the people in the states afterwards to be formed northwest of the Ohio, unalterable, unless by common consent; one of which stipulations is, that 'no person demeaning himself in a peaceable manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.' For this provision is claimed the sanction of an unalterable law of Congress; and it is insisted that the city ordinances above have violated it; and what the force of the ordinance is north of the Ohio, we do not pretend to say, as it is unnecessary for the purposes of this case. But as regards the State of Louisiana, it had no further force, after the adoption of the state constitution, than other Acts of Congress, organizing, in part, the territorial government of New Orleans, and standing in connexion with the Ordinance of 1787. So far as they conferred political rights, and

arises in those cases where the validity of a state law is drawn in question, on the ground that it violates the provisions of a treaty. As where a law of the State of Georgia prohibited persons residing within the territory of the Cherokee Indians (without taking an oath of allegiance to that state), with whom several treaties had been entered into by the United States, which recognised them as a sovereign nation, and guarantied to them their territory.¹

§ 267. In all cases, however, in which the validity of a statute is drawn in question, on the ground of its repugnancy to the Constitution, laws, or treaties of the United States, in order to give jurisdiction to the Supreme Court of the United States, under the 25th section of the Judiciary Act, the law must have been passed by a state, a member of the Union, and a public body owing obedience and conformity to its Constitution and laws. And, therefore, a law passed by the legislature of a territory is not within the operation of the Judiciary Act.²

secured civil and religious liberties (which are political rights), the laws of Congress were all superseded by the state constitution; nor is any part of them in force, unless they were adopted by the Constitution of Louisiana as laws of the state. It is not possible to maintain that the United States hold in trust, by force of the Ordinance, for the people of Louisiana, all the great elemental principles, or any one of them, contained in the Ordinance, and secured to the people of the Orleans territory during its existence. It follows, no repugnance could arise between the Ordinance of 1787 and an Act of the Legislature of Louisiana, or a city regulation founded on such act; and, therefore, this court has no jurisdiction on the last ground assumed, more than on the preceding ones. In our judgment, the question presented by the record is exclusively of state cognizance, and equally so in the old states and the new ones; and that the writ of error must be dismissed."

See further as to the question whether the Ordinance of 1787 is still in force, *Pollard v. Hagan*, 3 Howard, 212; *Strader v. Graham*, 10 Howard, 82.

¹ *Worcester v. The State of Georgia*, 6 Peters, 515.

² *Scott v. Jones*, 5 Howard, 243. The President, &c., of the Miners' Bank of Dubuque *v. The State of Iowa*, 12 Howard, 1. In this last case, Mr. Justice Daniel, delivering the opinion of the court, said: "By

§ 268. Instances where the validity of an authority exercised under the United States has been drawn in question,

the plaintiffs in error it is insisted, that the averments in their rejoinder being admitted by the demurrer, it follows, *ex consequenti*, that the repealing law of the territory of Iowa was unconstitutional, as a law arbitrarily abrogating the charter of the bank, and, therefore, a law *impairing the obligation of a contract*. In revising the case just made this court do not consider themselves called upon to test either the power of the government of Iowa for the enactment of the statute complained of, the coincidence or incompatibility of that statute with the 10th section of the first article of the Constitution, or regularity of the proceedings in the court below. At the threshold of their examination of this case, they are met by an inquiry far more important and controlling than either of these, viz., an inquiry into their own authority to effect, under any aspect under which this case is presented to them, the result which is sought at their hands. Whatever authority there exists in this court to re-examine and reverse the judgments or decrees of the courts, not those regularly appertaining to the organized judicial system of the United States, such authority must be traced to the 25th section of the law establishing the 'Judicial Courts of the United States,' by which section alone the power of this court, for the purposes above stated, was created and clearly defined. By recurrence to that section, it will be perceived, in order to give the corrective power to that tribunal, that, by the decision of the *state court*, there must have been 'drawn in question the validity of a statute, or an authority exercised under the United States, and the decision be against their validity;' or it must be 'where is drawn in question the validity or statute of, or an authority exercised *under any state*, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed under such clause of the Constitution, treaty, statute, or commission.' By a comparison of the record before us, with the section of the Judiciary Act above quoted, we think it nowhere apparent that there has been, by the decision of the Court of Iowa, drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, much less that there has been a decision against the validity of either; that there has been drawn in question the validity of a statute of, or an authority exercised *under any state*, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or the construction of any

and the decision of the state court has been against its validity, are presented by the cases of *Neilson v. Lagon* and

clause of the Constitution, or of any treaty, or statute of, or commission held under the United States, and a decision adverse to the validity of the latter. And, it may be observed, that every requisite to form a ground of jurisdiction enumerated in each of the predicaments comprised in the statutes, must combine, in order to give to this court the power invoked by the plaintiffs in error. The alleged wrong which the court are called on to redress, is not an act of *state power* at all; it is an act of *territorial government* of Iowa, by which was repealed an act of the preceding *territorial government* of Wisconsin; consequently, the decision of the court below asserted no *state* act or power in opposition to the Constitution, treaties, or laws, or to a commission or authority of or under the United States, and presents therefore no grounds of jurisdiction here, either as derived from the language of the statute, or from any construction heretofore given of it. If the question, whether a writ of error would lie from this court to review the acts of the territorial governments could ever have been regarded as in any sense equivocal upon the language of the 25th section of the Judiciary Act, such a question could not now be considered as open, under the express adjudications ruled by this court. Thus, in the case of *Scott v. Jones*, 5 Howard, p. 341, it was expressly declared, 'that an objection to the validity of a statute, on the ground that the legislature which passed it were not competent or duly organized, under the Acts of Congress and the Constitution, so as to pass valid statutes, is not within the cases enumerated in the 25th section of the Judiciary Act, and, therefore, this court has no jurisdiction over the subject. That in order to give this court jurisdiction, the statute, the validity of which is drawn in question, must be passed by a *state*, a member of the Union, and a public body owing obedience and conformity to its Constitution and laws. That if public bodies, not duly admitted into the Union, undertake, as states, to pass laws which might encroach on the Union, or its granted powers, such conduct would have to be reached either by the power of the Union to put down insurrection, or by the ordinary penal laws of the states or territories within which their bodies are situated and acting; but their measures are not examinable by this court upon a writ of error. They are not *states*, and cannot pass statutes within the meaning of the Judiciary Acts.' Other cases cited by the court, in the opinion just quoted, might be adduced, to show the difference ever taken by the court in reference to its relation to the states as states, and as contradistinguished from the territories of the United States. It seems to us, that the control of these territorial governments properly appertains to that branch of the government which creates and can change or modify

Clements v. Barry. In the first, the plaintiff claimed the land in controversy under an authority which he alleged had

them to meet its views of public policy, viz., the Congress of the United States. That control has certainly not been vested in this court, either in mode or in substance, by the 25th section of the Judiciary Act. It has been argued in this case, that as Congress, in creating the territorial governments of Wisconsin and Iowa, reserved to themselves the power of disapproving and thereby annulling the acts of those governments, and had, in the exercise of that power, stricken out several of the provisions of the charter of the Bank of Dubuque, enacted by the legislature of Wisconsin, assenting to the residue; and that, therefore, the charter of this bank should be regarded as an Act of Congress, rather than of the territorial government; consequently, the decision of the state court, in favor of the repealing law of Iowa, must be held to be one in which was drawn in question and overruled the validity of a statute of, or an authority exercised under the United States, and as a decision also against a right, title, privilege, set up under a statute of the United States. The fallacy of this argument is easily detected. Congress, in erecting the territorial governments, and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from these powers, until expressly sanctioned by themselves, whilst for considerations equally strong they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental. A different system of procedure would have been fatal to all practical improvement in those territories, however urgently called for; nay, might have disarmed them of the very power of self-preservation. An invasion or insurrection, or any other crisis demanding the most strenuous action, would have had to remain without preventive or remedy, till Congress, if not in session, could be convened or when in session, must have awaited its possibly procrastinated aid. The argument would render also the acts of the territorial government, even the most wholesome and necessary, and though indispensably carried to the extreme of authority, obnoxious to the charge of usurpation or criminality. The reverse of this argument, whilst it is accordant with the investiture of general legislative power in the territorial governments, places them in the position of usefulness and advantage towards those they were bound to foster, and subjects them, at the same time, to proper restraints from their superior. The charter of the Bank of Dubuque, enacted in all its details and powers ever possessed by it (and according to which it was in fact organized) by the legislature of Wisconsin, must be looked upon as the creature of that legislature. To regard it, as we are urged to do by the argument of the plaintiff in

been exercised by the Secretary of the Treasury in behalf of the United States, and the decision of the state court was against the validity of the authority so exercised.¹ In the last, the marshal of the United States had levied an execution upon certain property, under a judgment of the circuit court, which was taken out of his custody by a writ of replevin issued by a state court, and the supreme court of the state decided adversely to the claim of the marshal.²

§ 269. Another class of cases, arising under the third specification of the statute, are those where the construction of some clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, is drawn in question, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party under such clause of the Constitution, treaty, statute, or commission. One branch of this class of cases consists of those where a party sets up a title under a treaty or an Act of Congress. The principles which regulate the jurisdiction in these cases have been elaborately considered.

§ 270. The 25th section of the Judiciary Act, in respect to rights protected by the Constitution, or by a treaty or law of the United States, is co-extensive with the clause of the Constitution which extends the judicial power to cases arising under the Constitution, laws, or treaties of the United

error, would constitute rather a bank of the United States, situated *without* the United States, and operating within the territory of Wisconsin, now the State of Iowa, independently of the power or local policy of that state, and beyond the reach of its faculties or obligations to be exerted for its own citizens. We think that the positions, urged for the plaintiff in error, leave the objections to the jurisdiction, as above stated, in their full force. We regard both the charter granted by Wisconsin, and the repeal of that charter by Iowa, alike as acts of the territorial authorities, and not as the acts of any state of this Union; and that as such this court has no power, by writ of error, to take cognizance of them in virtue of, and for the objects designated by, the 25th section of the Judiciary Act."

¹ 7 Howard, 772.

² 11 Howard, 398.

States. A right may be created by the Constitution, or a law, or a treaty, or it may spring from some other source, and be protected by the Constitution, a law, or a treaty. The jurisdiction of the Supreme Court of the United States extends, both by the language of the Constitution and that of the Judiciary Act, to the review of a case in which a right is protected by the Constitution, a law, or a treaty of the United States, or in which it is created by either.¹ But where a right springs from some other source, in order to gain the jurisdiction, it is necessary that it should be protected by the Constitution, or a treaty, or Act of Congress.² For example, if a party relies solely on a complete title to land in Louisiana derived from the Spanish government, and the treaty of cession has ceased to be applicable to the title, and it is not affected by any Act of Congress, a decision of the state court upon it cannot be reviewed under the 25th section of the Judiciary Act.³ But if the title of either party, or that of both parties, depends upon an Act of Congress, or is affected by it, and the decision of the state court is against the right thus set up, the Supreme Court has jurisdiction to review that decision, and may look into the previous Spanish concession, on which the Act of Congress is supposed to operate, for the purpose of construing that act.⁴ But where a title in Louisiana is protected by the treaty of cession, so that a decision of the state court against its validity would be subject to revisal under the 25th section of the Judiciary Act, yet if the state court only applies the local laws of the state to the construction of the grant, for the purpose of determining boundaries, it is not a decision against its validity, and the Supreme Court of the United States has no jurisdiction.⁵

¹ *City of New Orleans v. De Armas*, 9 Peters, 224, 233.

² *Ibid.*

³ *Ibid.*

⁴ *Pollard's Heirs v. Kibbie*, 14 Peters, 353; *City of Mobile v. Eslava*, 16 Peters, 234; *Chouteau v. Eckhart*, 2 Howard, 344.

⁵ *McDonough v. Millaudon*, 3 Howard, 693. Moreover, Congress, in acting upon complete grants, recognised them as they stood; and the Act May 11th 1820, confirming such as were recommended for confir-

§ 271. And in cases of title which springs from or originates in a treaty, or Act of Congress, or patent, it depends, according to recent decisions, upon the question adjudicated in a state court, whether the decision can be revised under the 25th section of the Judiciary Act. If both parties claim under the treaty, law, or patent, and their validity or construction is not contested, and the contest is simply which party is entitled to the right created by the treaty, law, or patent, and the right itself is not denied by the state court, the Supreme Court of the United States cannot take jurisdiction. This point has been illustrated in two recent cases, in which it was very carefully considered. In 1839, a treaty was made between the United States and Mexico, providing for the "adjustment of claims of citizens of the United States on the Mexican republic." Under this treaty, a sum of money was awarded to be paid to the members of the Baltimore Mexican Company, who had subscribed money to fit out an expedition against the then government of Mexico, under General Mina, in 1816. In 1825, the Republic of Mexico assumed the payment of this debt of General Mina, but it was not paid until it was awarded by the commissioners under the treaty of 1839. In 1817, one Goodwin, who owned a share of this debt, took the benefit of the Insolvent Laws of the State of Maryland, and one Gill (the plaintiff), was appointed permanent trustee of his estate, in 1837; but in 1817, there had been a provisional trustee appointed (one Brown), to whom Goodwin had executed a deed of assignment of all his property; in 1825, Brown conveyed to Robert Oliver, and in 1839, Goodwin assigned to Oliver all his title and interest in the claim of the Company against Mexico. The suit in the state court of Maryland was brought by Gill against Oliver's executors,

mation by the register and receiver, had no reference to any particular surveys. A decision of a state court, therefore, which may be in opposition to one of those surveys, is not against the validity of a title existing under an Act of Congress, and the Supreme Court of the United States has no jurisdiction in such a case. *Ibid.*

and the question was, which of these parties was entitled to the money which had been paid under the treaty, and which had been paid into court by stakeholders. On a writ of error to the Supreme Court of the United States, a majority of the court held, that in deciding this question, the state court put no construction on the treaty or award, asserted by one party to be the true one, and denied by the other; that whether the money paid into court under the award, and first acknowledged by Mexico as a debt in 1825, existed as a debt transferable by the Maryland Insolvent Laws in 1817, or whether it, for the first time, assumed the nature of a chose in action transferable by assignment after 1825, when acknowledged of record by Mexico, and passed by the assignment of Goodwin to Oliver, was a question wholly *dehors* the treaty and award, and involving the construction of the laws of Maryland only, and not of any treaty or statute or commission under the United States.¹

¹ Gill v. Oliver's Executors, 11 Howard, 529, 545. Mr. Chief Justice Taney, Mr. Justice McLean, Mr. Justice Wayne, and Mr. Justice Woodbury, dissented. The following is the reasoning adopted by the majority of the court, in the opinion delivered by Mr. Justice Grier: "If this court can take jurisdiction of this case under the 25th section of the Judiciary Act, it must be under either the first or third clause, as the second is admitted to be wholly inapplicable to it.

"1. The first is, 'where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity.'

"2. The third is 'where is drawn in question the construction of any clause of the Constitution, or of a treaty, or a statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party under such clause,' &c.

"1. We have sought in vain through the record of this case to find any question raised directly by the pleadings, or 'by clear and necessary intendment therefrom' touching the validity of any treaty, statute, or authority exercised under the United States.

"Both parties claim certain moneys in court as assignees of Lyde Goodwin, who was a member of the 'Baltimore Mexican Company,' and entitled to a certain proportion of the money awarded to said Company as a just claim on the Mexican government. The validity of the award, or the treaty under which it was made, is not called in question by either

§ 272. At a subsequent term, the same question came again before the court in another case, in which it was in-

party, as both claim under them. In order to ascertain the effect of previous assignments made by Lyde Goodwin, the history of the origin of his claim necessarily makes a part of the case.

"The treaty and award are introduced as a part of this history, as facts not disputed by either party. The money being in court, both the treaty and the award were *functi officio*, and no decision of the rights of the claimants *inter se* can, in the nature of the case, involve the validity of either. The decision of the Court of Appeals, that the original contract with Mina, in 1816, did not create such a debt as would pass by the insolvent laws of Maryland, neither directly nor by implication questions the validity of any treaty, statute, or authority under the United States.

"That the Baltimore Mexican Company set on foot and prepared the means of a military expedition against the territories and dominions of the King of Spain, a foreign prince with whom the United States were at peace, is a fact in the history of the case not disputed, and which, if wrongly found by the court, would not give us jurisdiction of the case.

"That such conduct of the Company in making their contract with General Mina was a high misdemeanor, punishable with fine and imprisonment by the fifth section of the Act of the 5th of June, 1794, chap. 51, cannot be disputed by any one who will read the statute; and the conclusion drawn therefrom by the court below, that the contract of the Company with Mina, in 1816, being founded on an illegal transaction, was void by the law of Maryland, where it was made, and passed no equity, right, or title whatsoever to an insolvent assignee in 1817, involved no question of 'any treaty or statute of, or an authority exercised under the United States.'

"The validity or binding effect of the original contract with Mina is neither directly or indirectly affirmed, either in the Convention with Mexico, or in the award of the commissioners under it.

"The fact that the 'Baltimore Mexican Company' exposed not only their property to capture by the Spanish vessels of war, but their own persons to fine and imprisonment by the authorities of the United States, only enhanced the justice and equity of their claims against the new government of Mexico.

"The original contract with General Mina was a Maryland contract, and its validity and construction are questions of Maryland law, which this court is not authorized to decide in the present action.

"2. We are equally at a loss to discover in this record where or how 'the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under the United States,' is drawn in question in this case.

"As we have already said, both parties claim money in court; and,

sisted that although the original contract with General Mina was illegal and void, and therefore no right of property

in order to test the value of their respective assignments from Lyde Goodwin, introduce the history of the claim from its origin.

"The treaty and award are facts in that history. They were before the court but as facts, and not for construction. If A. hold land under a patent from the United States, or a Spanish grant ratified by treaty, and his heirs, devisees, or assignees dispute as to which has the best title under him; this does not make a case for the jurisdiction of this court under the 25th section of the Judiciary Act. If neither the validity nor construction of the patent or title under the treaty is contested, if both parties claim under it, and the contest arises from some question without or *dehors* the patent or the treaty, it is plainly no case for our interference under this section.

"That the title originated in such a patent or treaty, is a fact in the history of the case incidental to it, but the essential controversy between the parties is without and beyond it. So in this case, both claim the money in court. It is a fact, that the money has been paid by the Republic of Mexico, which has been pronounced just and equitable by commissioners under the Convention of 1839. It is a fact, also, that the origin of this claim was for arms and ammunition furnished for an expedition under General Mina, for the purpose of insurrection against the Spanish government. It is a fact, that the Baltimore Mexican Company, or the individuals comprising it, exposed themselves to punishment under the Neutrality Act. It is a fact, also, that afterwards, when Mexico had succeeded in establishing her independence, when her rebellion had become a successful revolution, that she very justly and honorably made herself debtor to those who perilled their property and persons in her service at the commencement of her struggle. It is a fact, that though this claim was acknowledged as a just debt by Mexico as early as 1825, payment was never obtained till after the award of the commissioners under the convention with Mexico in 1839, 'for the adjustment of claims of the United States on the Mexican Republic.' It is a fact, that this claim thus recognised by the Mexican Congress, was pronounced a just debt in favor of citizens of the United States against the Republic of Mexico.

"But whether this debt of the Mexican government, first acknowledged and made tangible as such in 1825, did previously exist as an equity, a right, or a chose in action capable of passing by assignment under the insolvent laws of Maryland, in 1817, is a question not settled in the treaty or award, nor involving any question as to the construction of either, but arising wholly from without, and entirely independent of either the one or the other. The treaty was, that 'all claims of citizens

arising out of it could pass to any one in 1817, yet that the subsequent recognition and adoption of the obligation, by the new government of Mexico, had relation back, so as to con-

of the United States found to be just and equitable, should be paid.' The award was, that this claim of the 'Baltimore Mexican Company,' which had been acknowledged in 1825 as a valid claim by Mexico, was a just debt, not a false or feigned one, and ought to be paid. The money is awarded to be paid to Glenn and Perine, 'in trust for whom it may concern.' The award does not undertake to settle the equities or rights of the different persons claiming to be legal or equitable assignees or transferees of the interests of the several members of the Company. That was left to the tribunals of the state where the members of the Company resided and the assignments were made. In deciding this question, the courts of Maryland have put no construction on the treaty or award, asserted by one party to be the true one, and denied by the other. It was before them as a fact only, and not for the purpose of construction. Whether this money paid into court, under the award, and first acknowledged by Mexico as a debt in 1825, existed as a debt transferable by the Maryland insolvent laws in 1817, or whether it, for the first time, assumed the nature of a chose in action, transferable by assignment after 1825, when acknowledged of record by Mexico, and passed by the assignment of Lyde Goodwin to Robert Oliver, was a question wholly *dehors* the treaty and award, and involving the construction of the laws of Maryland only, and not of any treaty or statute, or commission under the United States.

"It is a conclusive test of the question of jurisdiction of this court in the present case, that, if we assume jurisdiction, and proceed to consider the merits of the case, we find it to involve no question either of validity or construction of treaties or statutes of the United States.

"But the only questions in the case will be found to be, what was the effect of the appointment of George M. Gill, in 1837, as permanent trustee, under the insolvent laws of Maryland, of 1805? Was the void and illegal contract with Mina, made in 1816, such a chose in action as would pass by such insolvent law in 1817? Or did it first become an assignable claim after it was acknowledged by Mexico in 1825, and, as a new acquisition of Lyde Goodwin after his insolvency, pass by his assignment. A resolution of those questions, by or through anything to be found on the face of the treaty or award, or any necessary intendment or even possible inference therefrom, is palpably impossible.

"The whole case evidently turns on the construction of the laws of Maryland, and on facts connected with the previous history of the claim, which are not disputed, and which are incidental to the treaty and award, but which raise no question either as to their validity or construction."

firm and legalize the original transaction: and, therefore, that the decision of the state court denying the right of the trustee appointed in 1817 was a decision against a right derived under the treaty and award of the commissioners, which, therefore, brought the case within the 25th section of the Judiciary Act. The court replied, that upon this aspect of the case, if the record had shown any well-founded ground for maintaining it, jurisdiction might have been entertained: but that a majority of the court were of opinion that the question, whether the treaty had relation back, so as to legalize and confirm the previously illegal contract, did not arise and was not decided in the state court, and that the only question decided was the effect and operation to be given under the insolvent laws of Maryland to the contract with General Mina of 1816.¹ The question, it must be allowed, is *inter apices juris*.

§ 273. But where a right is claimed to arise under a treaty or an Act of Congress, in order to give jurisdiction to the Supreme Court of the United States, the party who sets up that right must claim it for himself, and not for a third person in whose title he has no interest. Thus, in an early case, where, in an action of ejectment, between two citizens of Maryland, for a tract of land in Maryland, the defendant set up an outstanding title in a British subject, which he contended was protected by the British treaty of 1794, and, therefore, that there was an existing title out of the plaintiff; and the state court decided that there was no such outstanding title; the Supreme Court of the United States held, on writ of error, that if the title, alleged to have been protected by the treaty, had been set up by those in whom it was said to be vested, it would have been a case arising under a treaty; but as the plaintiff in error's own title was not affected by the treaty, it was not protected by it, and the decision of the state court could not be reviewed under the 25th section of

¹ Williams v. Oliver, 12 Howard, 111, 120.

the Judiciary Act.¹ So, also, it has been recently held, that if the defendant in an ejectment suit claims a right to the possession of land derived under a title which springs from a reservation in a treaty between the United States and an Indian tribe, and a state court decides against the validity of such title, the Supreme Court of the United States has jurisdiction to review the decision. But, if the defendant merely sets up the title of the reservee as an outstanding title, and thus prevents a recovery by the plaintiff, without showing in himself a connexion with the title of the reservee, and then a state court decides against the defendant in the ejectment, the decision cannot be reviewed under the 25th section.² There must be a right, title, privilege, or exemption claimed under a treaty, or statute, &c., and the decision of the state court must be against the claim set up by the party himself. Two inquiries, therefore, must be made in all cases in which the third ground of jurisdiction provided in the 25th section of the Judiciary Act, is relied upon, namely, 1st, whether the right, title, privilege, or exemption was claimed under the Constitution, or a treaty, or statute of the United States, or an authority exercised under the United States; 2dly, whether the decision of the state court was against the right, title, privilege, or exemption thus set up.

§ 274. As to the first question, although the statute merely requires that a right, title, privilege, or exemption should be claimed to be protected or given by the Constitution, or a treaty, or an Act of Congress, yet if it appears that the Constitution, treaty, or law of the United States is not applicable to the case, the writ of error will be dismissed for want of jurisdiction. Thus, where a party claimed title to a negro slave through a French inhabitant of the territory of Illinois, who held her as such previous to the year 1787, and the state court of Missouri held that she was free, and

¹ *Owings v. Norwood's Lessee*, 5 Cranch, 344.

² *Henderson v. The State of Tennessee*, 10 Howard, 311, 322. Mr. Justice McLean, Mr. Justice Wayne, Mr. Justice McKinley, and Mr. Justice Woodbury, dissented from this decision.

this decision was sought to be reviewed under the 25th section of the Judiciary Act, upon the ground that the ordinance of 1787 protected the French inhabitants in their "rights" and "property," or, at least, that it did not destroy a right which had originated under other laws; the Supreme Court of the United States held, that the title did not originate under an Act of Congress; that the provisions of the ordinance concerning property and rights were general, not specific; that the Constitution of the State of Illinois must be looked to for the guarantees respecting property, to which its citizens were to resort; and if the right was protected by that Constitution, as a pre-existing right originating under other laws, it was not enough to give jurisdiction under the 25th section, that an Act of Congress did not take away that right.¹

§ 275. In like manner, where the treaty of Louisiana stipulated that until its admission into the Union, its inhabitants should be protected in the enjoyment of their liberty, property, and religion; and the Act of Congress which admitted Louisiana into the Union, admitted its inhabitants "to the enjoyment of all the rights, advantages, and immunities of citizens of the United States;" it was held, that the right to bring questions of title decided in a state court before the Supreme Court of the United States, was not one of those immunities; that the inhabitants of Louisiana enjoy all the advantages of American citizens, when their titles are decided by the tribunals of the state; and that the Act of Congress merely carried into execution the provisions of the treaty, and could not be construed to give appellate jurisdiction over all questions of title.²

§ 276. So, also, where an Act of Congress, of May 29th, 1830, provided for a partition between tenants in common of pre-emption rights in quarter sections, according to cer-

¹ *Menard v. Aspasia*, 5 Peters, 504.

² *New Orleans v. De Armas*, 9 Peters, 224.

tain rules of division, and a state court made partition upon other principles, in a case of less than a quarter section, it was held, that as the Act of Congress was applicable only to quarter sections, the partition made could not be reviewed under the 25th section of the Judiciary Act.¹ So, also, where a pre-emptioner, under an Act of Congress, in violation of the provisions of the act, sold his inchoate right to a trustee, who loaned him money from the trust fund to pay the government, and the trustee was ordered by a state court to hold the property subject to the trust, it was held that no title from the United States had been acquired, and consequently, that the decision of the state court could not be reviewed under the 25th section.²

§ 277. In the second place, as has been more than once observed, in order to give jurisdiction to the Supreme Court of the United States, under the 25th section of the Judiciary Act, the decision of the state court must have been against the right, title, privilege, or exemption set up under the Constitution, or a law, or treaty, or a commission of the United States. Thus, where a suit was brought in a state court upon a marshal's bond, under the Act of Congress of April 10th, 1806, ch. 21, by a person injured by a breach of the condition of the bond, and the defendants set up as a defence to the action that the suit ought to have been brought in the name of the United States, and the state court decided that it was well brought by the party injured in his own name; the Supreme Court of the United States held, on writ of error, that the exemption set up being merely as to the form of the action, and no question arising as to the legal liability of the defendants under the Act of Congress, they had no authority to re-examine the judgment, so far as respected the construction of that part of the act which provided that suits on marshals' bonds "shall be commenced and prosecuted six years after the said right of action shall

¹ *Downes v. Scott*, 4 Howard, 500.

² *Udell v. Davidson*, 7 Howard, 769.

have accrued, and not afterwards," this being a mere question as to the time when the right of action accrued, not involving any right, title, privilege, or exemption under the Act of Congress, which depended upon its construction.¹ So, also, where the Supreme Court of Missouri, in a case already referred to, had decided that a woman, claimed to be a slave, was free, she having been born at a place under the jurisdiction of the Ordinance of 1787, for the government of the Northwestern Territory: it was held that a writ of error would not lie to the Supreme Court of the United States, among other reasons, because the decision was in favor of the provisions of the ordinance. But it was said, that if the decision of the state court had been against the provisions of the ordinance, a writ of error might have been brought by the woman, if the ordinance could, under the circumstances, be regarded as an Act of Congress. But the plaintiff in error had no title depending upon an Act of Congress, for the ordinance, instead of creating any title in slaves, expressly prohibited it.² But where both parties claim a right or title in a state court, which depends upon the same Act of Congress, the decision of the state court, however given, is necessarily within the terms of the Judiciary Act, and the Supreme Court of the United States may revise the decision.³

§ 278. In like manner, where the defendant, who had been sued in a state court, pleaded his discharge under the Bankrupt Act of 1841, passed by Congress, and the plea was allowed, and the plaintiffs brought a writ of error to the Supreme Court of the United States, it was held, that the decision, having been in favor of the privilege or exemption given by the statute, the plaintiffs had no ground for a writ of error, although the defendant might have had, if the deci-

¹ *Montgomery v. Hernandez*, 12 Wheaton, 132.

² *Menard v. Aspasia*, 5 Peters, 504.

³ *Mathews v. Zane*, 4 Cranch, 382; *Ross v. Doe*, on the demise of Borland, 1 Peters, 655; *Buel v. Van Ness*, 8 Wheaton, 312.

sion had been against him.¹ But where it appeared that at the trial in the state court, the plaintiff in error claimed the land in dispute under an authority which he alleged had been exercised by the Secretary of the Treasury in behalf of the United States, and the decision was against the validity of the authority thus alleged to have been exercised; it was held to be a proper case for a writ of error.² So, too, where the decision of a state court is in favor of the validity of a state statute, which is alleged to be repugnant to the Constitution, laws, or treaties of the United States, the party against whom such a decision is made may have it revised in the Supreme Court of the United States, by writ of error;³ but if the decision of the state court is against the validity of the statute, on the ground that it is repugnant to the Constitution of the United States, a writ of error does not lie.⁴

279. It has been previously stated, that in order to give the Supreme Court jurisdiction, under the 25th section of the Judiciary Act, it must appear on the record itself to be one of the cases enumerated in that section; and nothing out of the record can be taken into consideration. Various modes have been pointed out, in which this may appear by the record. It may be shown, first, either by express averment, or by a necessary intendment in the pleadings in the case; or secondly, by the direction given by the court, and stated in the exception; or thirdly, when the proceeding is according to the law of Louisiana by the statement of facts, and of the decision as usually made in such cases by the court; or fourthly, it must be entered on the proceedings of

¹ *Strader v. Baldwin*, 9 Howard's Rep. 261. Promises alleged to have been made by the bankrupt after his discharge are not the subject of jurisdiction under the 25th section: *Linton v. Stanton*, 12 Howard, 423.

² *Neilson v. Lagow*, 7 Howard, 772.

³ *Briscoe v. The Commonwealth Bank*, 11 Peters, 257.

⁴ *Walker v. Taylor*, 5 Howard, 64; *The Commonwealth Bank of Kentucky v. Griffith*, 14 Peters, 56.

the appellate court in cases where the record shows that such a point may have arisen and been decided, that it was in fact raised and decided; and this entry must appear to have been made by order of the court, or by the presiding judge, by order of the court, and certified by the clerk, as a part of the record in the state court. Fifthly, in proceedings in equity, it may be stated in the body of the final decree of the state court. Sixthly, it must appear from the record that the question was necessarily involved in the decision, and that the state court could not have given the judgment or decree which they passed, without deciding it.¹ But it has never been held, that the record of the proceedings of the highest court must state in terms a misconstruction by that court, of the Act of Congress. It is enough that it is an inference of law, from the inspection of the whole record, that the highest court did thus misconstrue an Act of Congress, and annul a right or title otherwise valid, by reason of such misconstruction. The Supreme Court is not confined to an inspection of that part of the record which sets out the proceedings of the highest court alone; but may look at the record of the proceedings of the inferior state court, in connexion with the proceedings of the highest court, in order to deduce therefrom the points decided by the latter. As, when the grounds of the decision of the highest court of the state are not stated in the record, the Supreme Court will look into the bill of exceptions, taken in the court of original jurisdiction, to see what points were carried up to the highest court, and whether they were necessarily involved in its judgment.²

¹ *Armstrong v. The Treasurer of Athens County*, 16 Peters, 281, 285.

² *Neilson v. Lagow*, 12 Howard, 98.

CHAPTER V.

THE SPECIAL APPELLATE JURISDICTION OF THE SUPREME COURT, IN FLORIDA, LOUISIANA, AND CALIFORNIA LAND CLAIMS.

§ 280. THERE is a peculiar system of jurisprudence, of a mixed character, resulting from the rules of determination which have been prescribed to the courts of the United States by various Acts of Congress, passed from time to time for the adjudication and settlement of private land claims, growing out of the grants of other governments, which have ceded certain territories to the United States.

§ 281. Thus, by the treaty of February 22d, 1819, Spain ceded to the United States the territories of East and West Florida. The second article of this treaty was in these words: "His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida. The adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks, and other buildings, which are not private property, archives and documents, which relate directly to the property and sovereignty of said provinces, are included in this article. The said archives and documents shall be left in possession of the commissioners or officers of the United States, duly authorized to receive them."¹

¹ 8 Stat. at Large, 254.

§ 282. The eighth article of the treaty was as follows:—
“That all grants of land made before the 24th of January, 1818, by the King of Spain, or by his lawful authorities, in those territories, shall be¹ ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling the conditions of their grants, shall complete the same within the terms limited in the same, respectively, from the date of this treaty; in default of which the said grants shall be null and void. All grants made since the said 24th of January, 1818, when the first proposal, on the part of his Catholic Majesty, for the cession of Florida, was made, are hereby declared, and agreed to be, null and void.”²

§ 283. By an act passed March 23d, 1823, certain commissioners were appointed to receive and adjust the land claims of the inhabitants of the ceded territory, and to report the same to the Secretary of the Treasury.³ By another act, passed February 8th, 1827, further provisions were made on the same subject.⁴ By a subsequent act, passed May 23d, 1828 (§ 6), it was provided, “That all claims to land within the territory of Florida, embraced by the treaty, &c., which shall not be decided and finally settled under the foregoing provisions of this act, containing a greater quantity of land than the commissioners were authorized to decide, and above the amount confirmed by this act, and which have not been reported as antedated or forged, by said commissioners, or register and receiver acting as such, shall be received and adjudicated, by the judge of the superior court of the district within which the land lies, upon the petition of the claimant,

¹ For the construction of this expression, see *post*, § 286.

² 8 Stat. at Large, 258.

³ 3 Stat. at Large, 768.

⁴ 4 Stat. at Large, 202.

according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district judge, and claimants in the State of Missouri, by Act of Congress, approved May 26th, 1824, entitled, "An act, enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas, to institute proceedings to try the validity of their claims." By a proviso, all claims annulled by the treaty, and all claims not presented to the commissioners, according to the Acts of Congress, were excluded.¹ The 7th section of the act gave the claimants an appeal from the decision of the district judge to the Supreme Court of the United States, according to the directions of the Act of May 26th, 1824; the 9th section gave an appeal by the United States, and the 10th section made the United States a party to the proceedings.² Finally, by an act passed May 26th, 1830, it was directed that "*all the remaining claims, which have been presented according to law and not finally acted upon, shall be adjudicated and finally settled upon the same conditions, restrictions, and limitations, in every respect,*" as were prescribed by the Act of May 23d, 1828.³

§ 284. It is necessary now to turn to the act passed to carry into effect the treaty with France of April 30th, 1803, by which Louisiana was ceded to the United States, in order to see the rules of determination established for the adjudication of claims of this description. By the treaty of St. Ildefonso, October 1st, 1800, Spain ceded the province of Louisiana to France, and by the treaty of April 30th, 1803, France ceded the same to the United States. By the third article of the latter treaty, it was stipulated that the inhabitants, until received to the full rights of citizens of the United States, should be maintained and protected in the free enjoy-

¹ 4 Stat. at Large, 284, 285, 286.

² *Ibid.*

³ By an act passed February 22d, 1847, all the cases pending in the territorial courts were transferred to the District Court of the United States, for the District of Florida, 9 Stat. at Large, 128.

ment of their liberty, property, and religion.¹ By the act passed May 26th, 1824, the claimants of lands in Louisiana, under French or Spanish grants, were directed to present petitions, for inquiry into, and decision on, the validity of their titles, to the District Court of the State of Missouri; and claimants in the Territory of Arkansas were directed to present the like petitions to the superior court for that territory. The 2d section of the act provided, "That every petition which shall be presented under the provisions of this act, shall be conducted according to the rules of a court of equity, except that the answer of the district attorney of the United States shall not be required to be verified by his oath, and tried, without any continuance, unless for cause shown; and the said court shall have full power and authority to hear and determine all questions arising in said cause, relative to the title of the claimants, the extent, locality, and boundaries of the said claim, or other matters connected therewith, fit and proper to be heard and determined, and, by a final decree, to settle and determine the question of the validity of the title, according to the law of nations, the stipulations of any treaty, and proceedings under the same; the several Acts of Congress in relation thereto; and the laws and ordinances of the government from which it is alleged to have been derived; and all other questions properly arising between the claimants and the United States; which decree shall, in all cases, refer to the treaty, law, or ordinance, under which it is confirmed or decreed against; and the court may, at its discretion, order disputed facts to be found by a jury, according to the regulations and practice of the said court, when directing issues before the same court; and, in all cases, the party against whom the judgment or decree of the said district court may be finally given, shall be entitled to an appeal, within one year from its rendition, to the Supreme Court of the United States, the decision of which court shall be final and conclusive between the

¹ 8 Stat. at Large, 200, 201, 202.

parties: and, should no appeal be taken, the judgment or decree of the said district court shall, in like manner, be final and conclusive."¹

§ 285. The rules of determination thus established have become again important, both from the revival of the Act of 1824,¹ and the recent enactment of similar provisions for the adjustment of land claims in California.²

§ 286. At an early period in the course of the inquiries which arose under these laws, it became necessary for the Supreme Court of the United States to ascertain the meaning and effect of the 8th article of the treaty with Spain. If, on the one hand, the language of the article were to be construed as importing an act to be done by the United States, for the confirmation and ratification of grants made by the Spanish authorities in Florida, before the 24th of January, 1818, a question might arise whether the Acts of 1828, and 1824, directing an adjudication upon the claims of parties holding such grants in the courts of the United States, could be carried into effect, with reference to imperfect titles; for those provisions related to claims which had not been acted upon by Congress, and if a confirmation by the United States was necessary to a good title, such confirmation, being a legislative act, must precede any judicial action. But on the other hand, if the words of the treaty "shall be ratified and confirmed," were so construed as not to import the necessity of a future act of confirmation by the United States, in order to make any of the titles valid which rested upon grants of the Spanish authorities made before the cession, then the inquiry would be simply a judicial in-

¹ 4 Stat. at Large, 52, 53. By an act passed June 17th, 1844, the provisions of the Act of 1824, which was limited to two years from its date, were revived and extended to the states of Missouri, Arkansas, and Louisiana, and to those parts of the states of Mississippi and Arkansas south of the 31st degree of north latitude, and between the Mississippi and Perdido rivers, for the term of five years.

² See *post*.

vestigation, and an adjudication, under the Acts of 1828 and 1824, between two parties, both claiming to be owners of the land in controversy, namely, the claimant who made title from a grant of the Spanish authorities, on the one side, and the United States, who claimed the land as part of the public domain ceded by the treaty, on the other.

§ 287. In determining this question, the court recognised, as lying at the basis of the whole subject, the doctrine of the law of nations, that neither cession nor conquest touches the private property of individuals, situated within the ceded or conquered country. In either case, whether of conquest or of cession, the former sovereign gives place to the sovereign making the conquest or receiving the cession, and the latter assumes dominion over the country; but the rights of property of the inhabitants remain unchanged. Whatever was the property of the former sovereign, passes by the cession or the conquest to the new government, and nothing more. This general doctrine was held, also, to be confirmed by the provisions of the treaty. It was manifest from the tenor of the 2d article, that the King of Spain undertook to cede to the United States only what belonged to him; lands which he had previously granted, were not his to cede; and consequently, the language of the 8th article was to be construed with reference to the manifest intention of the parties to cede and to receive only what the law of nations and the treaty itself must be supposed to contemplate.¹

§ 288. Applying this principle to the construction of the 8th article, it was found that the treaty had been executed in duplicate originals, the one in English, and the other in Spanish; that the expression employed in the Spanish side

¹ The United States *v.* Arredondo, 6 Peters, 691; Same *v.* Percheman, 7 Peters, 51; Mitchel *v.* The United States, 9 Peters, 711; The United States *v.* Clarke, 8 Peters, 445; Delassus *v.* The United States, 9 Peters, 133; The United States *v.* Wiggins, 14 Peters, 334; Same *v.* Clarke, 16 Peters, 228.

of the treaty, corresponding to the English words, "shall be ratified and confirmed," imported that the grants "should remain ratified and confirmed;" and it was held, that both sides of the treaty ought to be so construed, as to reconcile its provisions to the unquestionable principles of the law of nations, which fixed the character of all property as it was at the time of the cession.¹ It was considered, moreover,

¹ United States v. Percheman, 7 Peters, 51, 88, and the cases above cited. In Percheman's case, Mr. Chief Justice Marshall said, "It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become a law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory. Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government, would have been unaffected by the change. It would have remained the same as under the ancient sovereign. The language of the second article conforms to this general principle, 'His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, by the name of East and West Florida.' A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted, were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time, the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property. If this could be doubted, the doubt would be removed by the particular enumeration which follows. 'The adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings which are not private property, archives and documents which relate directly to the

that the provisions of the 8th article, which declared that "the owners in possession of such lands" who had not per-

property and sovereignty of the said provinces, are included in this article.'

"This special enumeration could not have been made, had the first clause of the article been supposed to pass not only the objects thus enumerated, but private property also. The grant of buildings could not have been limited by the words, 'which are not private property,' had private property been included in the cession of the territory.

"This state of things ought to be kept in view when we construe the eighth article of the treaty, and the acts which have been passed by Congress for the ascertainment and adjustment of titles acquired under the Spanish government. That article in the English part of it is in these words: 'All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty.'

"This article is apparently introduced on the part of Spain, and must be intended to stipulate expressly for that security to private property which the laws and usages of nations would, without express stipulation, have conferred. No construction which would impair that security further than its positive words require, would seem to be admissible. Without it, the titles of individuals would remain as valid under the new government as they were under the old; and those titles, so far at least as they were consummate, might be asserted in the courts of the United States, independently of this article.

"The treaty was drawn up in the Spanish as well as in the English language. Both are originals, and were unquestionably intended by the parties to be identical. The Spanish has been translated, and we now understand that the article, as expressed in that language, is, that the grants 'shall remain ratified and confirmed to the persons in possession of them, to the same extent,' &c., thus conforming exactly to the universally received doctrine of the law of nations. If the English and the Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail. If, as we think must be admitted, the security of private property was intended by the parties, if this security would have been complete without the article, the United States could have no motive for insisting on the interposition of government in order to give validity to titles which, according to the usages of the civilized world, were already valid. No violence is done to the language of the treaty by a construction which conforms the English and

formed the conditions of their grants, should have a certain time to complete them, obviously intended that the concessions themselves should be treated as valid; inasmuch as the words, "in possession of the lands," according to their legal import, meant those who had a legal seisin and possession, under a valid title, and not merely those who had an actual possession by occupancy.¹

§ 289. Upon these constructions, when the courts of the United States were required to adjudicate these claims upon certain rules of determination, one of which was "according to the provisions of any treaty," the question to be decided was, whether the claimant held a title, complete or inchoate, by a grant or concession of the Spanish authorities, which severed the land in question from the domains of the crown of Spain, and made it private property, prior to the 24th of January, 1818.² If it was a complete title, that is, if the grant was in

Spanish parts to each other. Although the words 'shall be ratified and confirmed' are properly the words of contract, stipulating for some future legislative act, they are not necessarily so. They may import that they 'shall be ratified and confirmed' by force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable."

¹ *United States v. Arredondo*, 6 Peters, 743, 744.

² In *Smith v. The United States*, 10 Peters, 326, 330, the Supreme Court said, "In consenting to be made defendants in equity at the suit of the claimants, the United States waived all rights which the treaty could give them as purchasers for a valuable consideration without notice. They bound themselves to carry into specific execution, by patent, every grant, concession, warrant, or order of survey, which, before the date fixed in the treaty, had created any legal or equitable right of property in the land so claimed; so that, in every case arising under the law, one general question was presented for the consideration of the court: Whether, in the given case, a court of equity could, according to its rules and the laws of Spain, consider the conscience of the king to be so affected by his own or the acts of the lawful authorities of the province, that he had become a trustee for the claimant, and held the land claimed by an equity upon it amounting to a severance of so much from his domain."

absolute property, and no conditions remained to be performed, the courts were required to adjudge the land to belong to the claimant, inasmuch as the necessary effect of the treaty, and the provisions of its 2d article, preserved all private property as it existed at the cession. If, on the other hand, the title was incomplete and inchoate, as if acts remained to be done by the claimant in order to complete his title, then the grant or concession, if valid by the laws of Spain, remained valid after the cession, and the sole inquiry would be, whether the claimant had performed the conditions, or, if he had not performed them, according to the terms of the treaty, whether they could be dispensed with. But if it should turn out, on inquiry, that the original grant or concession was not valid according to the laws of Spain, so that it would not have been binding upon the crown of Spain, if the territory had remained under its dominion, then the question of the performance or non-performance of any conditions of the grant would be immaterial.

§ 290. The doctrine, therefore, established by a series of decisions, in reference to claims under the Florida treaty, was, that perfect titles, or titles completed before the cession, needed no confirmation, legislative or judicial, after the cession, but that they were valid under the government of the United States, as they were under that of Spain; that the 8th article of the treaty had no necessary application to perfect titles, but that they were absolute rights of property, at the time of the cession, protected by the implication of the 2d article, and by the principles of public law; and that in regard to imperfect or inchoate titles, the grants or concessions on which they were dependent were intended to be, and were declared to be, ratified and confirmed by the 8th article, to the same extent that they would have been if the country had not been ceded. This coincided with the law of nations, which would have protected them to the same extent without this provision. In this view, the 8th article was mainly

an enunciation of a rule, by which the performance of the conditions annexed, expressly or by implication, to these inchoate grants, was to be regulated; fixing the date of the treaty, as the date when the respective terms of time, contained in the grants for the performance of the conditions, was to commence running, in cases where the holders of such grant had been prevented from fulfilling their conditions, by the recent circumstances of the Spanish nation and the revolutions in Europe.¹

¹ The United States *v.* Arredondo, 6 Peters, 691; Same *v.* Percheman, 7 Peters, 51; Same *v.* Clarke, 8 Peters, 436; Mitchell *v.* The United States, 9 Peters, 711; United States *v.* Smith, 10 Peters, 326; United States *v.* Kingsley, 12 Peters, 476; Same *v.* Wiggins, 14 Peters, 334, 349. In this last case, Mr. Justice Catron, delivering the opinion of the court, said, "It was adjudged by this court, in the cases of Arredondo and Percheman, 6 and 7 Peters, that the words 'shall be ratified and confirmed,' in reference to perfect titles, should be construed to mean 'are' ratified and confirmed, in the present tense. The object of the court in these cases was to exempt them from the operation of the eighth article, for the reason that they were perfect titles by the laws of Spain, when the treaty was made; and that when the soil and sovereignty of Florida were ceded by the second article, private rights of property were, by implication, protected. The court, in its reasoning, most justly held that such was the rule by the laws of nations, even in cases of conquest, and undoubtedly so in a case of cession; therefore, it would be an unnatural construction of the eighth article, to hold that perfect and complete titles, at the date of the treaty, should be subject to investigation and confirmation by this government; and, to reconcile the article with the law of nations, the Spanish side of the article was referred to, in aid of the meaning of the American side, when it was ascertained that the Spanish side was in the present tense; whereupon the court held, that the implication resulting from the second article being according to the law of nations, that and the eighth article were consistent; and that perfect titles 'stood confirmed' by the treaty; and must be so recognised by the United States, and in our courts.

"The construction of the treaty being settled, a liberal inquiry in the cases referred to was, were they perfect, unconditional Spanish grants? Percheman's had no condition in it; and the only difficulty involved was, whether it had been made by the proper authority. The court held that it had been so made.

"The grant to Arredondo and son was for four leagues square, and

§ 291. It was in reference to this construction of the treaty, that Congress were to be presumed to have legislated, when they directed that in all the remaining claims which had not been finally acted upon by Congress, the validity of the titles should be adjudicated in the courts of the United States, under certain rules of decision. These rules required that the adjudication should be, 1st, according to the laws of nations; 2d, according to the stipulations of any treaty and proceedings under the same; 3d, according to the several Acts of Congress in relation thereto; and 4th, according to

made as a present grant from its date, with the subsequent condition that the grantees should settle and improve the land in three years, and on failure, the grant should become void; further, that they should settle on it two hundred Spanish families; but no time was fixed for the performance of this condition. Possession was taken and improvements made within the three years, but the families were not settled when the country was ceded. This court declared, that after the cession of Florida to the United States, the condition of settling Spanish families had become, probably, impossible, by the acts of the grantor, the government of Spain, and certainly immaterial to the United States; therefore, the grant was discharged from the unperformed conditions and single.

"That the perfect titles, made by Spain, before the 24th of January, 1818, within the ceded territory, are intrinsically valid, and exempt from the provisions of the eighth article, is the established doctrine of this court; and that they need no sanction from the legislative or judicial departments of this country. But that there were, at the date of the treaty, very many claims whose validity depended upon the performance of conditions in consideration of which the concessions had been made and which must have been performed before Spain was bound to perfect the titles, is a fact rendered prominently notorious by the legislation of Congress, and the litigation in the courts of this country for now nearly twenty years. To this class of cases the eighth article was intended to apply; and the United States were bound, after the cession of the country, to the same extent that Spain had been bound before the ratification of the treaty, to perfect them by legislation and adjudication; and to this end the government has provided that it may be sued by the claimants in its own courts, where the claims shall be adjudged, and the equities of the claimants determined and settled according to the law of nations, the stipulations of the treaty, and the proceedings under the same, and the laws and ordinances of the government from which the claims are alleged to have been derived."

the laws and ordinances of the government from which the title was alleged to have been derived. The proceedings were, moreover, directed to be conducted according to the rules of a court of equity (except that the Attorney of the United States was not to verify his answer by his oath), and the court were to hear and determine all questions relative to the title of the claimants, the extent, locality, and boundaries of their claims, or other matters connected therewith, fit and proper to be heard and determined; and, by a final decree, to settle and determine the question of the validity of the title, by the rules above stated. A brief examination of the scope of each of these rules will introduce to us the principles which have been settled by their application to various cases.

§ 292. First, as to the law of nations. We have already seen, that where the principles of public law came to be applied to these claims, they led at once to the doctrine that *all* titles, whether perfect or imperfect, at the time of cession, derived from the former sovereign of a ceded country, are valid and obligatory upon the nation receiving that cession, to the same extent that they would have been valid and obligatory if the country had not been ceded; so that if there are acts, which, in good faith and equity, the former sovereign would have been bound to do to enable the claimant to complete an inchoate title, the new sovereign is equally bound to perform the same or equivalent acts, by the rules of the law of nations. These rules have been declared by the Supreme Court of the United States to be "the usage of all civilized nations," by which, when territory is ceded, the property of its inhabitants is universally protected.¹

§ 293. The next rule of determination is found in "the stipulations of any treaty, and the proceedings under the same." The Supreme Court have said, that by the stipula-

¹ United States v. Arredondo, and the case of Henderson v. Poindexter, 12 Wheat. 530.

tions of a treaty are to be understood its language and apparent intention manifested in the instrument, with a reference to the contracting parties, the subject-matter, and persons on whom it is to operate.¹ The Acts of Congress which direct an adjudication upon the validity of these titles, refer the whole construction of the treaty, in all that relates to them, as a judicial question, to the court.² What its stipulations are, and what its effect, upon the validity of all titles derived from the Spanish government, prior to the 24th of January, 1818; what is the meaning of its provisions with regard to the fulfilment of conditions annexed to the grants; and what duties it imposes on the government of the United States, and what rights result from it, are to be determined upon the principles of justice and the rules of equity.³ So, too, the effect of all other treaties, made between the former sovereign or sovereigns of the country, and any Indian or other nation, to the obligations of which the United States have succeeded, is to be regarded and settled in the adjudication, if it is involved in any of the questions raised.⁴

§ 294. By "proceedings under the treaty," are to be understood, say the Supreme Court, "the acts and proceedings of the government, or others, under its authority, subsequent to the treaty, in taking possession of the ceded territory, in organizing the local government, its acts within the authority of the organic law, the promises made, the pledges given by either the general or local government. Also the proceedings of commissioners and other officers or tribunals appointed by Congress to decide, and report on these claims, so far as they have adopted and settled any rules and principles of decision within their powers, as guides to their judgment."⁵

§ 295. The third rule of decision is "the Acts of Con-

¹ United States *v.* Arredondo, 6 Peters, 691.

² Ibid.

³ Ibid.

⁴ Mitchel *v.* The United States, 9 Peters, 711.

⁵ United States *v.* Arredondo, 6 Peters, 691, 712.

gress in relation thereto;" meaning all laws on the subject-matter of the treaty, or the proceedings under it; or laws embracing lands, property, and rights dependent on the provisions of the treaty and the proceedings under it. "Where Congress have, by confirming the reports of commissioners or other tribunals, sanctioned the rules and principles on which they were founded, it is a legislative affirmance of the construction put by their tribunals on the laws conferring the authority, and prescribing the rules by which it should be exercised: or which is to all intents and purposes of the same effect in law. It is a legislative ratification of an act done without previous authority, and this subsequent recognition and adoption is of the same force as if done by pre-existing power, and relates back to the act done."¹

§ 296. The fourth rule of decision is "the laws and ordinances of the government from which it (the title) is alleged to have been derived." By laws and ordinances is not meant merely the enactments of legislative bodies, but whatever, by the principles of the government in question has the force of law, in the dominions of that government; including also usages and customs. Upon this point, the Supreme Court say, "The laws of an absolute monarchy are not its legislative acts; they are the will and pleasure of the monarch, expressed in various ways: if expressed in any, it is a law; there is no other law-making, law-repealing power, call it by whatever name, a royal order, an ordinance, a cedula, a decree of council, or an act of an authorized officer, if made or promulgated by the king, by his consent or authority, it becomes as to the persons or subject-matter to which it relates, a law of the kingdom. It is emphatically so in Spain and all its dominions. Such, too, is the law of a Spanish province conquered by England. The instructions of the king to his governors are the supreme law of the conquered colony; Magna Charta, still less the common law, does not

¹ Opinion of the court in Arredondo's case.

extend its principles to it, *King v. Picton*, 30 St. Tr. 8vo. ed. 866. A royal order, emanating from the king, is a supreme law, superseding and repealing all other preceding ones inconsistent with it. The laws of the Indies have not their force as such by any legislative authority vested in the council; their authority is by the express or implied expression of the royal will and pleasure; they must necessarily yield to an order, prescribing a new rule, conferring new powers, abrogating or modifying previous ones.

“The principle that the acts of a king are in subordination to the laws of the country, applies only where there is any law of higher obligation than his will; the rule contended for may prevail in a British, certainly not in a Spanish province. There is another source of law in all governments,—usage, custom, which is always presumed to have been adopted with the consent of those who may be affected by it. In England, and in the states of this Union, which have no written constitution, it is the supreme law; always deemed to have had its origin in an act of a state legislature of competent power to make it valid and binding, or an Act of Parliament; which, representing all the inhabitants of the kingdom, acts with the consent of all, exercises the power of all, and its acts become binding by the authority of all: 2 Co. Inst. 58; Wills, 116. So it is considered in the states and by this court: 3 Dall. 400; 2 Peters, 656, 657.

“A general custom is a general law, and forms the law of a contract on the subject-matter; though at variance with its terms, it enters into and controls its stipulations as an Act of Parliament or state legislature: 2 Mod. 238; W. Black. 1225; Doug. 207; 2 D. & E. 263, 264; 1 H. Bl. 7, 8; 2 Binney, 486, 487; 2 Binney, 287; 2 S. & R. 17; 8 Wh. 591, 592; 9 Wh. 584, 591; and the cases there cited from 4 Mars. 252; 9 Mars. 155; 3 Day, 346; 1 Caines, 43; 18 Johns. 230; 5 Cr. 492; 6 D. & E. 320; Day, 511; 5 Cr. 33. The court not only may, but are bound to notice and respect general customs and usages as the law of the

land, equally with the written law, and, when clearly proved, they will control the general law; this necessarily follows from its presumed origin,—an Act of Parliament or a legislative act. Such would be our duty under the second section of the Act of 1824, though its usages and customs were not expressly named as a part of the laws or ordinances of Spain. The first section of that act, giving the right to claimants of land under titles derived from Spain, to institute this proceeding, for the purpose of ascertaining their validity, and jurisdiction to the court to hear and determine all claims to land which were protected and secured by the treaty, and which might have been perfected into a legal title under and in conformity to the laws, usages, and customs of Spain, makes a claim founded on them one of the cases expressly provided for. We cannot impute to Congress the intention to not only authorize this court, but to require it to take jurisdiction of such a case, and to hear and determine such a claim according to the principles of justice, by such a solemn mockery of it as would be evinced by excluding from our consideration, usages and customs, which are the law of every government, for no other reason than that in referring to the laws and ordinances in the second section, Congress had not enumerated all the kinds of laws and ordinances by which we should decide whether the claim would be valid if the province had remained under the dominion of Spain. We might as well exclude a royal order because it was not called a law. We should act on the same principle, if the words of the second section were less explicit, and according to the rule established in *Henderson v. Poindexter*, see 12 Wh. 530, 540.”¹

§ 297. It seems, too, from the directions of the act requiring the courts finally to decide “all other questions properly arising between the claimants and the United States,” and to conduct the proceedings “according to the rules of a court of equity,” and to decide “upon the principles of justice,”²

¹ 6 Peters, 714.

² Act of 1824, § 2.

that when a question, such as fraud in making the grant, arises, to which the other rules of determination are not applicable, the rules of law and equity to be drawn from the decisions of the Supreme Court of the United States, will be applied.¹ So, too, the Supreme Court in these adjudications acts as a court of equity, and takes cognizance of imperfect, inchoate, and inceptive titles, as well as legal and perfect ones.²

Upon the subject of the evidence on which the adjudications are to proceed, the Supreme Court say: "The next subject for our consideration is, the evidence on which we are to decide. The third section of the Act is as follows: 'That the evidence which has been received by the different tribunals which have been constituted and appointed by law to receive such evidence, and to report the same to the Secretary of the Treasury, or to the Commissioners of the General Land Office, upon all claims presented to them respectively, shall be received and admitted in evidence for or against the United States, in all trials under this act, when the person testifying is dead, or beyond the reach of the court's process, together with such other testimony as it may be in the power of the petitioner, the person or persons interested in the defence made against establishing any claim, or the United States attorney to produce, and which shall be admissible according to the rules of evidence and principles of law.'

"These provisions of the Act of 1824 are applicable to this case; they have not been altered by the Act of 1828, and by the 8th section are expressly extended to the Florida claims. They are liberal—worthy of the government which has adopted and made them the rules by which to test the rights of private claimants to portions of the land embraced in the ceded territory. From a careful examination of the whole legislation of Congress on the subject of the Louisiana and Florida treaties, we cannot entertain a doubt that it has,

¹ *United States v. Arredondo*, 6 Peters, 716.

² *Mitchell v. The United States*, 9 Peters, 733.

from the beginning, been intended that the titles to the land claimed should be settled by the same rules of construction, law, and evidence, in all their newly-acquired territory. That they have adopted as the basis of all their acts, the principle, that the law of the province in which the land is situated, is the law which gives efficacy to the grant, and by which it is to be tested, whether it was property at the time the treaties took effect.

“The United States seem never to have claimed any part of what could be shown by legal evidence and local law to have been severed from the royal domain before their right attached. In giving jurisdiction to the District Court of Missouri to decide on these claims, the only case expressly excepted is that of *Jacques Glamorgan* (in section 12, 3 Story, L. U. S., 1964); and in the corresponding law, as to Florida; those annulled by the treaty and those not presented in time, according to the Acts of Congress. The United States have, by three cessions, acquired territory within which there have been many claims to land under Spanish titles. The first in point of time was by the compact with Georgia, in 1802, by the terms of which it was stipulated: ‘That all persons who, on the 27th October, 1795, were actual settlers within the territory thus ceded, shall be confirmed in all their grants, legally and fully executed prior to that day, by the former British government of West Florida, or by the government of Spain.’ (1 Laws, 489.)

“The stipulations of the treaties by which they acquired Louisiana and Florida, contained provisions of a similar nature as to claims to land under Spain before the cession.

“The whole legislation of Congress from 1803 to 1828, in relation to the three classes of cases, so far as respected Spanish titles, is of a uniform character on cases of corresponding description. The rules vary according to the kind of title set up; distinctions have been made in all the laws between perfect or complete grants, fully executed, or inchoate, incomplete ones, where a right had been in its

inception, under or by color of local law or authority, but required some act of the government to be done to complete it. Both classes have been submitted to the special tribunals appointed to settle, to report finally or specially upon them, and the claimants have, under certain circumstances, been permitted to assert their rights in court by various laws, similar in their general character, but varying in detail to meet the cases provided for."¹

§ 298. As the authorities of Spain were authorized to grant the public domain, in accordance with their own ideas of the merits and considerations presented by the grantee, two questions only could arise in the courts of the United States, viz., whether in fact a grant had been made, and its legal effect when made. As to the competent evidence that a grant had been made, it appears to have been the practice, in the Spanish province of Florida, for persons wishing to obtain grants of land from the government, to present a memorial to the governor, who made a decree thereon, which was filed in the office of the government secretary, and constantly retained there, unless in cases where what was called a royal title was ordered to be issued, when the decree was transmitted to the escribano's office. The decree, which referred to or otherwise adopted the memorial, usually directed the surveyor-general of the province to survey the land described, and constituted the grant or concession. But as a grant, it was inchoate until a survey and confirmation by the governor. It was the duty, therefore, of the grantee to present the grant to the surveyor-general, whose duty it was to give notice to the persons holding lands adjoining the place designated, that they might be present at the making of the survey, with their titles, so that there might be no interference, and then to lay out the lands granted, according to certain rules.² He then gave to the

¹ 6 Peters, 717.

² The United States *v.* Wiggins, 14 Peters, 334; Same *v.* Hanson, 16 Peters, 196.

party a certificate and plat of the survey, on which the governor founded his confirmation. When the treaty took effect, the duty of confirming these inchoate titles was, by the Acts of Congress, devolved on the courts of the United States, in execution of the treaty. There were thus two classes of cases, in regard to which confirmation was required: one, where the party had obtained a survey and certificate of the Spanish surveyor-general; and the other, where such a survey had not been made.

§ 299. In the first class of cases, the steps by which the titles have been proved have been, 1st, evidence of the grant or concession; and 2d, evidence that the survey had been made. Evidence of the grant consists of the properly authenticated copies of the original decree. One of the ordinary duties of the government secretary was, to make certified copies of the memorial and decree, and deliver them to the party; the decree of the governor generally directed these copies to be made for the use of the parties, the originals being placed on file in the secretary's office. As the copies thus made and certified were generally received as evidence of title in the Spanish courts of justice, the Supreme Court have held, that in this, as in all other cases, where the originals are confined to a public office, and copies are introduced, that the copy is (first), competent evidence by authority of the certificate of the proper officer; and (second), that it proves *prima facie* the original to have been of file in the office where the copy was made. The officer's certificate has accorded to it the force of a deposition.¹ Accordingly, where such a certificate has been produced, it has been held not to be necessary to account for the non-production of the original.² So, too, where a copy of the first copy was intro-

¹ The United States *v.* Wiggins, 14 Peters, 334, 346; Same *v.* Acosta, 1 Howard, 24.

² Ibid. Percheman's case, 7 Peters, 51, 84. In this case, Mr. Chief Justice Marshall, delivering the opinion of the court, said, "At the trial, the counsel for the claimant offered in evidence a copy from the office of

duced, and the loss of the first copy was proved, and the second was proved to have been made from it by the secre-

the keeper of public archives, of the original grant on which the claim is founded, to the receiving of which in evidence the attorney for the United States objected, alleging, that the original grant should be procured, and its execution proved. This objection was overruled by the court, and the copy from the office of the keeper of the public archives, certified according to law, was admitted. The attorney for the United States excepted to this opinion.

"It appears, from the words of the grant, that the original was not in possession of the grantee. The decree which constitutes the title appears to be addressed to the officer of the government, whose duty it was to keep the originals and to issue a copy. Its language, after granting in absolute property, is, 'for the attainment of which let a certified copy of this petition and decree be issued to him in all events equivalent to a title in form.' This copy is, in contemplation of law, an original.

"It appears, too, from the opinion of the judge, 'that by an express statute of the territory, copies are to be received in evidence.' The judge added, that 'where either party shall suggest that the original in the office of the keeper of the public archives, is deemed necessary to be produced in court, on motion therefor a subpoena will be issued by order of the court to the said keeper to appear and produce the said original for examination.'

"The Act of the 26th of May, 1824, 'enabling the claimants of lands within the limits of the State of Missouri and Territory of Arkansas, to institute proceedings to try the validity of their claims,' in its fourth section, makes it the duty of 'the keeper of any public records who may have possession of the records and evidence of the different tribunals which have been constituted by law for the adjustment of land titles in Missouri, as held by France, upon the application of any person or persons whose claims to lands have been rejected by such tribunals, or either of them, or on the application of any person interested, or by the attorney of the United States for the District of Missouri, to furnish copies of such evidence, certified under his official signature, with the seal of office thereto annexed, if there be a seal of office.'

"The Act of the 23d of May, 1828, supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida, declares, in its sixth section, that certain claims to lands in Florida, which have not been decided and finally settled, 'shall be received and adjudicated by the judge of the superior court of the district within which the land lies, upon petition of the claimants, according to the forms, rules, regulations, conditions, restrictions and limitations prescribed by (for) the district and claimants in the State of Missouri, by

tary of the board of commissioners established by Congress for ascertaining land claims in Florida, whose duty it was to translate Spanish documents given in evidence before the board, it was admitted as evidence of the existence of the original. But in this case, it was proved, that the papers in the office from which the first copy was taken, had been mutilated, since the first copy was taken; that the original was once in the office; and that it could no longer be found.¹

§ 300. The survey is proved to have been made by the Spanish authorities, by proving the signature of the surveyor-general to the certificate and plat delivered by him to the party. This is *prima facie* sufficient to authorize the reading of the paper:² and as the plat and certificate of the surveyor-general, returning that he had surveyed the land at the place granted, not by the assertion only that it was at the place, but by a description in legal form that it was so, would have been *prima facie* competent evidence, without further proof, on which the Spanish governor could found the confirmation, the same effect is due to them in the courts of the United States. Like the certificate of the secretary to a copy of the grant, they have accorded to them the force

Act of Congress, approved May 26th, 1824, entitled, 'An act enabling the claimants,' &c.

"The copies directed by the Act of 1824 would undoubtedly have been receivable in evidence on the trial of claims to lands in Missouri. Every reason which could operate with Congress for applying this rule of evidence to the courts of Missouri, operates with equal force for applying it to the courts of Florida; and a liberal construction of the Act of May 23d, 1828, admits of this application. The fourth section of the Act of May 26th, 1830, 'to provide for the final settlement of land claims in Florida,' adopts, almost in words, the provision which has been cited from the sixth section of the Act of May 23d, 1828.

"Whether these acts be or be not construed to authorize the admission of the copies offered in this cause, we think that on general principles of law, a copy given by a public officer whose duty it is to keep the original, ought to be received in evidence."

¹ The United States *v.* Delespine's Heirs, 12 Peters, 654.

² The United States *v.* Breward, 16 Peters, 143.

and character of a deposition.¹ But when proved, or admitted, the validity and legality of both the grant and the survey are to be tested by the laws and regulations of Spain, and are not conclusively established by the admission of the papers.²

§ 301. The return of a private surveyor, however, stands upon a very different footing. Such a survey is a private act, not made for the government, but at the instance and for the interest of the grantee. A decree of confirmation could not have been made upon it, without extrinsic proof that it was for the land granted, and that it had been lawfully made in regard to navigable waters, roads, adjoining grants, and line marks. With such proof, the Spanish governor could have ordered a perfect title to issue, founded on the survey, and the courts of the United States could do the same; but not otherwise.³

§ 302. In the second class of cases, namely, those in which no survey had been made by the Spanish authorities, or where, if made, the survey was invalid, the same course of proof as to the original grant must be followed, and the court will order a survey to be made at the place designated in the grant, if the grant appears to be valid.⁴

§ 303. In cases where there is no description in the governor's decree of any place where the land granted shall be located, but the surveyor-general is ordered to survey the lands

¹ Same *v.* Hanson; 16 Peters, 196, 200.

² Ibid. Where the surveyor-general had certified that the land surveyed was the tract granted to the petitioner, the court said that no reliance was to be placed on this assertion standing alone, but that taking the return in connexion with all the facts and circumstances appearing in the case, it tended to confirm the conclusion that the land was laid off in accordance with the grant. Low's case, 16 Peters, 167.

³ United States *v.* Hanson, Ib. 201.

⁴ The United States *v.* Rodman, 15 Peters, 130; Same *v.* Delespine's Heirs, 12 Peters, 654; 15 Peters, 226.

solicited "on places vacant," the act of the surveyor-general is necessary to sever the lands granted from the public domain. If a survey was made before the 24th of January, 1818, the grantee will take a title to the particular lands, because, up to that date, all grants made by the King of Spain, in whatever form, are recognised as valid by the treaty. But where no survey, in such a case, was made until after the 24th of January, 1818, the question would arise, whether the grant is to take effect from the date of the survey, or from the date of the decree; and it has been held, that while the survey must have been made at some time before the change of flags between the government of the United States and that of Spain, it is valid, if made after the 24th of January, 1818, in pursuance of a decree made before that date. The 8th article of the treaty, which limited the grants to that date, operated on the grants of the governor made before that date, but not on the subordinate acts of the surveyor in giving effect to the grant. The incipient claim under the governor's decree is not cut off by the treaty, provided the surveyor-general executes the governor's decree at any time before the change of flags.¹

§ 304. We may now proceed to the examination of the particular questions which have been decided by the application of these rules of decision to titles in Florida, derived from grants of the Spanish government or its officers. And the first of these questions relates to the authority of the granting officer. The grants or concessions of land referred to in the treaty, are all those made before a certain date, "by his Catholic Majesty, or by his lawful authorities." After great consideration, and a careful examination of the whole subject, the Supreme Court of the United States ascertained, that the power of disposing of the public domain had always been exercised by certain public officers of Spain in her colonies, and the principle was applied to their acts,

¹ The United States *v.* Acosta, 1 Howard, 24; Same *v.* Sibbald, 10 Peters, 313, 321; Same *v.* Clarke and Atkinson, 16 Peters, 228, 231.

that the actual exercise of this power, without any evidence of disavowal, revocation, or denial by the king, and his consequent acquiescence and presumed ratification, were sufficient proof, in the absence of any to the contrary, of the royal assent to its exercise.

In the *United States v. Arredondo*, 6 Peters, 691, 727, the Supreme Court said: "It is thus clearly evidenced by the acts, the words, and intentions of the legislature, that in considering these claims by the special tribunals, the authority of the officer making the grant, or other evidence of claim to lands, formed no item in the title it conferred; that the United States never made that a point in issue between them and the claimants to be even considered, much less adjudicated. They have submitted to the principle which prevails as to all public grants of land, or acts of public officers, in issuing warrants, orders of survey, permission to cultivate or improve, as evidence of inceptive and nascent titles, which is, that the public acts of public officers, purporting to be exercised in an official capacity, and by public authority, shall not be presumed to be a usurped but a legitimate authority, previously given or subsequently ratified, which is equivalent. If it was not a legal presumption that public and responsible officers, claiming and exercising the right of disposing of the public domain, did it by the order and consent of the government in whose name the acts were done, the confusion and uncertainty of titles and possessions would be infinite, even in this country, especially in the States whose tenures to land depend on every description of inceptive, vague, and inchoate equities, rising in the grade of evidence, by various intermediate acts, to a full and legal confirmation, by patent, under the great seal.

"To apply the principle contended for to the various papers which are sent from the general or the local land offices as instructions to officers under their direction, or evidence of incomplete title to land, by requiring any other evidence of the authority by which it was done than the

signature of the officer, the genuineness of the paper, proved by witnesses or authenticated by an official seal, would be not only of dangerous tendency, but an entire novelty in our jurisprudence, as 'a rule of equity or evidence,' or 'principle of law or justice.' The judicial history of the landed controversies, under the land laws of Virginia and North Carolina, as construed and acted on within those States, and in those where the lands ceded by these States to the United States lie, and Pennsylvania, whose land tenures are very similar in substance, in all which the origin of titles is in very general vague, inceptive equity, will show the universal adoption of the rule, that the acts of public officers, in disposing of public lands, by color or claim of public authority, are evidence thereof until the contrary appears, by the showing of those who oppose the title set up under it, and deny the power by which it is professed to be granted. Without the recognition of this principle, there would be no safety in title papers, and no security for the enjoyment of property under them. It is true that a grant made without authority is void under all governments (9 Cr. 99; 5 Wh. 303); but in all, the question is on whom the law throws the burden of proof, of its existence or non-existence. A grant is void unless the grantor has the power to make it, but it is not void because the grantee does not prove or produce it. The law supplies this proof by legal presumption, arising from the full, legal, and complete execution of the official grant, under all the solemnities known or proved to exist, or to be required by the law of the country where it is made, and the land is situated. A patent under the seal of the United States, or a state, is conclusive proof of the act of granting by its authority; its exemplification is a record of absolute verity. *Patterson v. Wain*, 5 Peters, 241.

"The grants of colonial governors before the Revolution, have always been and yet are taken as plenary evidence of the grant itself, as well as authority to dispose of the public lands. Its actual exercise, without any evidence of disavowal, revocation, or denial by the king, and his consequent

acquiescence and presumed ratification, are sufficient proof, in the absence of any to the contrary (subsequent to the grant), of the royal assent to the exercise of his prerogative by his local governors. This or no other court can require proof that there exists in every government a power to dispose of its property; in the absence of any elsewhere, we are bound to presume and consider, that it exists in the officers or tribunal who exercise it by making grants, and that it is fully evidenced by occupation, enjoyment, and transfers of property, had and made under them, without disturbance by any superior power, and respected by all co-ordinate and inferior officers and tribunals throughout the state, colony, or province where it lies.

“A public grant, or one made in the name and assumed authority of the sovereign power of the country, has never been considered as a special verdict; capable of being aided by no inference of the existence of other facts than those expressly found, or apparent by necessary implication, an objection to its admission in evidence on a trial at law, or a hearing in equity, is in the nature of a demurrer to evidence on the ground of its not conducing to prove the matter in issue. If admitted, the court, jury, or chancellor must receive it as evidence both of the facts it recites and declares, leading to and the foundation of the grant, and all other facts legally inferrible by either from what is so apparent on its face. Taking, then, as a settled principle, that a public grant is to be taken as evidence that it issued by lawful authority, we proceed to examine the legal effect of a Spanish grant, in adjudicating on their validity by the principles of justice in a court; and by the rules of equity, evidence, and law, directed by the Act of 1824, which forms a part of the law under which their validity is submitted to our judicial consideration.”

§ 305. From the grant itself, therefore, a right to make it was to be presumed.¹ This presumption was recognised by

¹ *The United States v. Percheman*, 7 Peters, 51, 95.

the 8th article of the treaty, in which the "authorities" referred to, whose grants were declared to be confirmed, were those persons who exercised the granting power by authority of the crown.¹ These persons were the governor, intendant, or

¹ In the *United States v. Clarke*, 8 Peters, 436, 449, the Supreme Court said: "The 8th article was not intended to enlarge the cession. Its principal object is to secure certain rights existing at the time, but not complete. It stipulates that all the grants of land (in Spanish "concessions of land") made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities in the said territories, ceded by his Majesty to the United States, shall be ratified and confirmed (in Spanish, shall remain ratified and confirmed) to the persons in possession of the lands (in the Spanish, in possession of them, that is, of the concessions), in the same extent that the same grants (in Spanish, they) would be valid, if the territories had remained under the dominion of his Catholic Majesty.

"It may be worth observing, that the language of the article is not 'all grants made by his Catholic Majesty, or by his lawful authorities,' which might perhaps involve an inquiry into the precise authority or instructions given by the crown to the person making the grant, and might impose on the claimant the necessity of showing that authority in each case, but 'by his Catholic Majesty, or by his lawful authorities in the said territories ceded by his Majesty to the United States.' That is, by those persons who exercised the granting power by authority of the crown. This is the generally received meaning of the words. They are equivalent to the words competent authorities, used in their place by the King of Spain in his ratification of the treaty. It may be also not entirely unworthy of remark, that the article expressly recognises the existence of these 'lawful authorities' in the ceded territories.

"It is not unreasonable to suppose that his Catholic Majesty might be unwilling to expose the acts of his public and confidential officers, and the titles of his subjects acquired under those acts, to that strict and jealous scrutiny which a foreign government, interested against their validity, would apply to them, if his private instructions or particular authority were to be required in every case, and that he might, therefore, stipulate for that full evidence to the instrument itself, which is usually allowed to the instruments used by the proper officer. The subject-matter of the article, therefore, furnishes no reason for construing its words in a more restricted sense than that in which they are uniformly used and understood. In that sense, they mean persons authorized by the crown to grant lands.

"The subsequent part of the sentence may, in some degree, qualify their meaning. The added words are, 'to the same extent that the same

captain-general, as the case might be, whose grants are of themselves presumptive evidence of the power to make them,

grant (they) would be valid, if the territories had remained under the dominion of his Catholic Majesty.' If this part of the sentence was intended as a limitation of the general provision which precedes it, the subject-matter of the article may serve in some measure to explain it.

"The general word 'grant' may comprehend both the incipient and the complete title. The greater number of those in Florida appear to have been of the first description. Many of these contained conditions, on the performance of which the right to demand a complete title depended. Without this qualification, the article might have been understood to make these conditional concessions absolute. Therefore, they are declared to 'be ratified and confirmed, to the same extent that the same grants (they) would be valid if the territories had remained under the dominion of his Catholic Majesty.' The parties add (continuing the idea), 'but the owners in possession of such lands (the proprietors) who, by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants (concessions), shall complete them within the terms limited in the same respectively from the date of this treaty, in default of which the said grants (they) shall be null and void.' But whether the intention of that part of the article which declares the extent to which the title it contemplates shall be valid, is limited to the conditions inserted in them, or qualifies the general preceding words, it cannot vary the sense of the term 'lawful authorities,' nor warrant the construction that a title derived from 'a lawful authority' creates no presumption of right, and leaves the holder under the necessity of proving every circumstance which would be required to support it, had it proceeded from a person not holding an office on which the power of granting lands had been conferred.

"These titles are to be valid to the same extent as if the territories had not been ceded. What is that extent? A grant made by a governor, if authorized to grant lands in his province, is *prima facie* evidence that his power is not exceeded. The connexion between the crown and the governor justifies the presumption that he acts according to his orders. Should he disobey them, his hopes are blasted, and he exposes himself to punishment. His orders are known to himself, and to those from whom they proceed, but may not be known to the world.

"Such a grant, under a general power, would be considered as valid, even if the power to disavow it existed, until actually disavowed. It can scarcely be doubted, so far as we may reason on general principles, that in a Spanish tribunal a grant, having all the forms and sanctions required by law, not actually annulled by superior authority, would be received as evidence of title.

so that the objector must show a want of power, if he relies upon it.¹ No excess of authority, or departure from it, is to be presumed.²

In *Strother v. Lucas*, 12 Peters, 410, 437, the Supreme Court said, "No principle can be better established by the authority of this court, than 'that the acts of an officer, to whom a public duty is assigned by his king, within the sphere of that duty, are *prima facie* taken to be within his power.' 'The principles on which it rests, are believed to be too deeply founded in law and reason, ever to be successfully assailed. He who would controvert a grant executed by the lawful authority, with all the solemnities required by law, takes on himself the burden of showing, that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud:' 8 Peters, 452, 453, 455, 464; 9 Peters, 134, 734, 735; S. P. 6 Peters, 727, &c., and cases cited; 10 Peters, 331; S. P. 1 Paine, 469, 470. The same rule applies to the judicial proceedings of local officers, to pass the title of land according to the course and practice of the Spanish law in that province (West Florida), 8 Peters, 310. Where the act done is contrary to the written order of the king, produced at the trial, without any explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motives set out therein; and according to some order known to the king and his officers, though not to his subjects: 7 Peters, 96; 8 Peters, 447, 451, 454, 456; 'and courts ought to require very full proof, that he had transcended his powers, before they so determined it,' 464; 9 Peters, 734. In following the course of the law of nations, this court has declared, that even in cases of conquest, the conqueror does no more than displace the sove-

¹ *Mitchell v. The United States*, 9 Peters, 711; *United States v. Clarke*, 16 Peters, 228; *Same v. Hanson*, *Ibid.* 198; *Same v. Delespine*, 15 Peters, 319.

² *Delassus v. The United States*, 9 Peters, 17.

reign, and assume dominion over the country: 7 Peters, 86 (10 Peters, 720, 729, *passim*).

“A cession of territory is never understood to be a cession of property of the inhabitants. The king cedes only that which belongs to him; lands he had previously granted, were not his to cede. Neither party could so understand the treaty. Neither party could consider itself as attempting a wrong to individuals, condemned by the whole civilized world. ‘The cession of territory,’ would necessarily be understood to pass the sovereignty only, and not to interfere with private property. *Ib.* 87. No construction of a treaty, which would impair that security to private property, which the laws and usages of nations would, without express stipulation, have conferred, would seem to be admissible further than its positive words would require. ‘Without it, the title of individuals would remain as valid under the new government, as they were under the old, and these titles, at least so far as they were consummated, might be asserted in the courts of the United States, independently of this article.’ *Ib.* 88; 6 Peters, 741, 742; *S. P.* 9 Peters, 133.

“The terms of a treaty are to be applied to the state of things then existing in the ceded territory: 8 Peters, 462. In that which had been held by Spain, the whole power of granting and confirming land titles had, by the royal order of 1754, been transferred to officers in the colonies, the commandants of posts, and local authorities, who acted in their discretion as the sole judges of the matter, condition, or consideration, in, on, or for which they conferred the right of property, as officers and competent authorities, to exercise the granting power. Such officers were in all the colonies; they made grants of all grades of title, as well in rewards for services as favors, or for the benefit of the country, as they pleased; being persons authorized by the king to grant lands, ‘he was not willing to expose the acts of his public and confidential officers, and the title of his subjects acquired under those acts, to that strict and jealous scrutiny, which a foreign government, interested against their validity, would

apply to them, if his private instructions or particular authority were to be required in every case; and that he might therefore stipulate for that full (evidence) to the instrument, which is usually allowed to instruments issued by the proper officer,' 8 Peters, 449, 450 to 458, 475, 488, 489; 7 Peters, 96; 9 Peters, 134, 169, 734; 10 Peters, 331; S. P. 6 Peters, 727, &c.; White's Comp. Sp. Laws, 218, 249. Such a grant under a general power would be considered as valid, even if the power to disavow it existed until actually disavowed: 8 Peters, 451. No such disavowal has ever been known to the court, in any of the numerous cases which have been before us, arising under the treaties of 1803 and 1819; and the assiduous researches of Mr. White have brought none to his knowledge: 8 Peters, 458; 10 Peters, 332; White's Comp. 9; from which it may be reasonably presumed that none exists."

§ 306. Taking it, then, as the settled doctrine, that a grant made by the Spanish authorities in Florida is to be taken as evidence that it issued by lawful authority, its legal effect, in an adjudication upon the validity of the title which rests upon it, is, that it is conclusive evidence of the existence of all the facts which were necessary to its being issued. "It is a universal principle," says the Supreme Court, "that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and the exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive, legislative, judicial, or special, unless an appeal is provided for, or other revision, by some appellate

or supervisory tribunal, is prescribed by law. . . . This is a very important principle, applying to all imperfect grants, concessions, warrants, or orders of survey. That the production of either is legal evidence, from which the legal presumption arises, that all preceding acts necessary to give it legal validity have been done before it issued."¹

§ 307. Thus, if the grant purports to have been made in consideration of military services,² or of the erection of a useful mill,³ or of other services rendered or losses sustained,⁴ all these facts are proved by the grant or concession itself, and are not to be inquired into, in adjudicating on the validity of the title. So, too, it has been held, in a Louisiana case, that where a general regulation, in reference to which the grant was to be presumed to have been made, required that the petitioner should have a certain number of tame cattle, to entitle him to the quantity of land asked for, it will be presumed that the fact was found, before the petition was granted, by those whose duty it was to make the grant in conformity with the regulation.⁵ But the subject of the consideration or motive of the grant belongs to the

¹ The United States *v.* Arredondo, 6 Peters, 729, 731.

² United States *v.* Percheman, 7 Peters, 51.

³ Same *v.* Sibbald, 10 Peters, 313; Same *v.* Clarke, 8 Peters, 436.

⁴ United States *v.* Clarke, 9 Peters, 168.

⁵ Chuteau's Heirs *v.* The United States, 9 Peters, 147, 153. In this case, Mr. Chief Justice Marshall said, "The only objection which can be made to the validity of this concession is, that the petitioner did not possess as many tame cattle as the regulations of O'Reilly required. The eighth article of those regulations declares, that no grant in the Opelousas, Attacapas, and Natchitoches, shall exceed one league in front by one league in depth. The ninth is in these words, 'to obtain in the Opelousas, Attacapas, and Natchitoches, a grant of forty-two arpents in depth, the applicant must make it appear that he is possessed of one hundred head of tame cattle, some horses and sheep, and two slaves to look after them; a proportion which shall always be observed for the grants to be made of greater extent than that declared in the preceding article.'

"There is some confusion in these two articles, which would lead to a

discussion of the topic of conditions precedent and subsequent, which will be treated in another connexion.¹

§ 308. At present, we have further to remark, that where the validity of a title is undertaken to be impeached for fraud in obtaining the grant, the court will apply the principles of law, which it has applied in other cases of fraud, viz., 1st, That actual fraud is not to be presumed, but ought to be proved by the party who alleges it. 2d, If the motive and design of an act may be traced to an honest and legitimate source equally as to a corrupt one, the former ought to be preferred. 3d, If the person against whom fraud is alleged should be proved to have been guilty of it in any num-

suspicion that the translation may not be accurate. The eighth declares that no grant shall exceed a league square; and the ninth, if it be understood literally, professes to prescribe the property which the applicant must possess to entitle him to a larger quantity than a league square.

"It is also observable, that this article is limited to the three districts mentioned, which are not in Upper Louisiana; and that they are peculiarly adapted to a grazing country, and to a grazing country only. There could be no motive for apportioning one hundred head of cattle to two slaves, in an agricultural country. It is probable that if the regulations of O'Reilly were extended to Upper Louisiana, they were extended with modifications, at least of the ninth article; so as to adapt the proportions of property required to the country to which the article was extended.

"This supposition derives great strength from the fact, that the lieutenant-governor, who must have understood his orders, certifies to the governor, in his decree, 'that the said applicant is in the circumstances that merit this favor.' The applicant is proved to have possessed more slaves than was required by the ninth article of O'Reilly's regulations, though not so many tame cattle.

"We think, also, that in the spirit of the decisions which have been heretofore made by this court, and of the acts of confirmation passed by Congress, the fact that the applicant possessed the requisite amount of property to entitle him to the land he solicited, was submitted to the officer who decided on the application; and that he is not bound to prove it to the court, which passes on the validity of the grant. These incomplete titles were transferable, and the assignee might not possess the means of proving the exact number of cattle in possession of the petitioner when the concession was made."

¹ See *post*.

ber of instances, still, if the particular act sought to be avoided be not shown to be tainted with fraud, it cannot be affected by those other frauds, unless in some way or other it be connected with, or form a part of them.¹

§ 309. In connexion with the subject of the authority of the granting officer, we have now to notice a very important principle which has been applied in the construction of the Florida grants, namely, that where the grant appears to have been made by an officer having general power to dispose of the public domain, if it appears to have been made upon a consideration on which the general power may be supposed to have been moved to make it, it will not be held void, although it may recite a special authority which turns out on examination not to have embraced the particular grant which has in fact been made. Thus, in the leading case upon this subject, the claimant, on the 16th March, 1816, styling himself a native of the province, presented a memorial to the Governor of East Florida, stating the service he had rendered the public in the construction of a saw-mill of great execution, and praying, in consideration thereof, a grant of the quantity of land which the Governor had thought fit to assign to the water-mills, equivalent to *five miles square*. On the 3d of April, the Governor made a decree, in which, after reciting that he had granted lands to other individuals on account of saw-mills or machines to be erected, but with condition of being without effect until the establishments had been made, and that the petitioner had exhibited proof of the actual erection of a mill of great utility, he granted to the petitioner the five miles square solicited, "of which a title shall be issued, comprehending the place, and under the boundaries set forth, without injury to a third person." The title, issued on the 6th of April, recited, that "whereas by a royal order communicated to the government on the 29th of October, 1790, by the captain-general of Cuba and the two Floridas, it is pro-

¹ The United States *v.* Arredondo, 6 Peters, 716.

vided, among other things, that to foreigners who, of their free will, present themselves to swear allegiance to our sovereign, there be granted to them lands gratis, in proportion to the workers that each family may have; and whereas Don George Clarke, inhabitant of the town of Fernandina, has presented himself, manifesting that he has constructed, from his own ingenuity, a machine that, with four horses, saws eight lines at one time, &c., and soliciting, in virtue thereof, a grant in absolute property of five miles square of land, &c.; therefore, and in consideration of the advantages arising from such improvements in this said province, and in order that, by rewarding the industrious and ingenious, it may serve as an example and stimulus to other inhabitants, I have found proper, by my decree of the present month, to order the issue of a competent title of property of said five miles square of land, as will more fully appear, &c. These I have resolved to grant, as in the name of his majesty I do grant," &c.

§ 310. It was objected that the royal order of the 29th October, 1790, recited in the grant of April 6th, 1816, did not authorize the grant, both because it was made for the purpose of inviting foreigners into the province, whereas the claimant was an inhabitant; and because it limited the quantity of land to be granted to a fixed number of acres for the workers that each family might have. The court said that if the validity of the grant depended upon its being in conformity with the royal order of 1790, it could not be supported; but that the grant, although it recited the order, did not profess to be founded on it, but it did profess to be founded on the motive of rewarding and encouraging the petitioner for having already constructed a valuable mill. A recital of a fact entirely immaterial, on which the grant did not profess to be founded, was held, therefore, not to vitiate a grant reciting other considerations on which it did profess to be founded, the matter which was recited being sufficient to authorize it. The real inquiry was,

whether the Governor had power to make grants for such considerations? The court then proceeded to inquire into the general power of the Governor of East Florida to make grants of lands; and upon the result of this inquiry they held that the term "lawful authorities," in the treaty, designated the Governor as certainly as if he had been expressly named; that he was the officer who was empowered by his sovereign to make grants of lands in that province, and in ceding the province to the United States, his sovereign had stipulated that grants made by him should be as valid as if the province had remained under his dominion. And in proceeding further to determine whether the Governor had, as was alleged in this case, exceeded his authority, by granting a larger quantity of land than he was empowered to grant, and on a consideration not warranted by law, the court, referring to the principle that the acts of an officer to whom a public duty is assigned by his king, within the sphere of that duty, are, *prima facie*, to be taken to be within his power, laid down the following very important rules: that if it be shown by the person holding the concession, that it was made by the officer authorized to grant lands, that it was the duty of this officer to give a regular account of his official transactions, and that no grant ever made by the person thus intrusted had ever been disapproved, courts ought to require very full proof that he had transcended his powers before they so determine.¹ The result of the inquiry in this case was, that the power of the Governor of East Florida was not so limited as to render this grant void.

§ 311. Percheman's case had been previously decided upon similar principles. A royal order of the 29th of March, 1815, had authorized grants by the Governor of a certain quantity of land to the soldiers of certain corps of militia. Percheman, an officer of the militia, petitioned the

¹ The United States v. Clarke, 8 Peters, 436, 446, 447, 448, 452, 463.

Governor for a much larger quantity, two thousand acres, referring to the royal order as a recognition of his military services, and obtained the grant. It was objected that the Governor had exceeded his authority; but the court held that, as the claimant was not one of the persons to whom the royal order authorized the limited grants, and as his military services as an officer were distinctly recognised in the royal order, and as one entitled to the royal bounty, the extent of which was not fixed, the papers did not show that the Governor had exceeded his authority in granting two thousand acres, although the petitioner referred to the royal order; for that was referred to as showing the favorable intentions of the crown towards the petitioner, and not as ascertaining limits applying to him, which the Governor could not transcend.¹

§ 312. There is, also, a subsequent case, where the royal order of October 29th, 1790, was referred to in the grant, which was for a larger quantity of land than the order authorized to be granted, but the petition and the grant both contained recitals showing that the grant was asked for and obtained upon particular services, and that the petitioner was not one of the class of persons contemplated by the royal order of 1790: the court held that the Governor's reference to the royal order was immaterial, and that the grant was valid under the Governor's general authority.²

¹ *The United States v. Percheman*, 7 Peters, 51, 94.

² *The United States v. Rodman*, 15 Peters, 130, 137. Upon this point the court said: "The second objection is, that if it be proved or admitted that the grant was made, still it is void, because it is not in conformity to the royal order of the 29th October, 1790, by virtue of which it declared the concession was made. That royal order will be found in 2 White's New Rec. 565.

"It is contended, that under the order grants can only be made to foreigners, and that the number of acres granted must be in proportion to workers. The argument is, professing to be made under the royal order, if the grant is not in accordance with it, it is void, and the *United States v. Clarke*, 8 Peters, 448, is cited to sustain the objection. The

§ 313. The case of Delespine was decided in conformity with Percheman's case. It was a case where the grant

authority has been mistaken. The court do say in that case, 'If the validity of the grant depends upon its being in conformity with the royal order of 1790, it cannot be supported.' But it immediately proceeds to show, though the royal order is recited in the grant, that it was in fact founded upon a meritorious consideration of the petitioner having constructed a machine of great value for sawing lumber. The court say, 'We cannot think the recital of a fact, entirely immaterial, on which fact the grant does not profess to be founded, can release an instrument making other considerations, on which it does profess to be founded, if the matter, as recited, be sufficient to authorize it. Without attempting to assign motives for the recital of that order, we are of opinion that in this case the recital is quite immaterial, and does not affect the instrument. The real question is, whether Governor Coppenger had power to make it?' And so it must be said that the recital of the royal order in this case is quite immaterial. The petitioner for the grant asks for it, reciting services and fidelity to the government in time of a rebellion, his imprisonment and loss of property to a great amount in consequence of it, 'all of which,' he says, 'are well known to your excellency.' In consideration of which he further states, that to repair his losses he intends to invest his means in the erection of a water saw-mill, and then asks his excellency, in consideration of his merits, and other circumstances in his favor, to grant him, in absolute property, a square of five miles, in the place designated in his petition. The Governor's decree, upon that petition, first recites the merits and services of the petitioner, which, he says, are well known to him, and then says, in conformity with the royal order of October, 1790, he grants him, in absolute property, the square of five miles. Now if it be the fact that the Governor had the power to make a larger grant than the quantity recited in the royal order, which was applicable to a particular class of persons, foreigners, it will not be contended, because he says, 'in conformity to the royal order,' that those words shall control a larger grant made to one who was not a foreigner, but a subject of his Catholic Majesty, particularly when it is stated, the considerations of the grant are the merits and losses of the grantee. That the Governor had the power to make the larger grant cannot be denied. It is to be found in the laws of the Indies, in the various regulations under which they granted lands in Florida for more than forty years, sanctioned by the King of Spain and the authorities representing him in Cuba, the Floridas, and Louisiana. The power of the Governor in this respect has been frequently affirmed by the decisions of this court, in cases growing out of claims to land under the eighth article of the treaty with Spain."

recited in the same way the royal order of March 29th, 1815, which limited grants to one hundred acres, and to persons of a particular regiment. But the general power of the Governor to make a larger grant of land was not thought to be restrained in making a grant to one who was not of the regiment designated in the order, when the papers show that it was made in consideration of services, and also of the surrender of another grant previously made for services.¹

§ 314. But where the grant or concession is made by a

¹ *The United States v. Delespine*, 15 Peters, 226, 231. In this case, the court said: "The second objection is, that if the grant is proved it is not in conformity to the royal order of the 29th March, 1815, by virtue of which it is declared the grant was made.

"That royal order has been under the consideration of this court in *Percheman's case*, 7 Peters, 96. In that case, it will be seen, that the petitioner refers in his memorial to the order of the 29th March, 1815, and that the Governor, in the grant for the land, says, 'In consideration of the provisions of the royal order, under date of 29th March last, which is referred to, I do grant to him in absolute property,' &c. But the court (referring to certificates which were annexed to the memorial for the grant, which the grant refers to as certificates annexed) said, 'Military service is the foundation of the grant, and the royal order is referred to only as showing that the favorable attention of the king had been directed to the petitioner.' 7 Peters, 96. The court sustained the grant in that case, notwithstanding it was said to have been made in consideration of the royal order of 1815, which limits grants to one hundred acres, and to persons of a particular regiment. The power in the Governor to make a larger grant of land was not thought to be restrained in making a grant to one who was not of the regiment designated in the order, and who applied for it on the ground of services.

"The reasoning in that decision cannot be mistaken. It applies with full force to the grant now under consideration, the decree of the Governor being alike in both cases. But this has an additional consideration recited in the memorial. The surrender of another grant previously made for services, recognised by the Governor in his acceptance of the retrocession offered by the memorialist. This is a grant in absolute property. Though it recites the order of the 29th March, 1815, the inducements for making it are considerations, which plainly show it was not intended by the Governor to be restrained to the number of acres limited by that order."

public officer or a board having no original authority to grant the public domain, but in pursuance of a testimonial issued by those in whom the authority to make grants was vested for the time being, and under directions "to despatch the corresponding title," to the lands mentioned in the testimonial, a departure from the testimonial and a location of the grant in a different place, will vitiate the grant, since it is a new and independent grant which the tribunal directed "to despatch the title" was not authorized to make. This was determined in the case of *The United States v. Delespine*, 16 Peters, 319, 329. The facts in this case, which were peculiar, will appear from the following extract from the opinion of the court:

"It is insisted that the evidence in the cause is insufficient to prove that the alleged grant or concession was ever made.

"It appears that on the 28th day of May, 1813, Arrambide applied to the Provincial Deputation at Havana for two leagues of land to each point of the compass, making ninety-two thousand one hundred and sixty acres; that on the 4th of December, 1813, the Deputation stated to the Council of St. Augustine that it granted the land to Arrambide, and referred the grantee to the Council to expedite to him the title.

"The ordinary mode of granting lands in Florida had been directly, either by the Captain-General of Cuba or the Governor of Florida; but owing to a recent call of the Cortes in Spain, and a reorganization of the Spanish government, existing at the date of the concession; and which state of things lasted only for a short time, the mode of proceeding, in regard to granting the public domain, was changed, and the powers vested in the tribunals known as 'the Provincial Deputations.' This appears by the royal order of the 4th of January, 1813, found in the United States' Land Laws, Appendix 1006. It was made the duty of the Provincial Deputations to devise the most convenient means of making grants, and through the Secretaries of State to report the same to the Cortes for their recognition and adoption. The

Deputation at Havana assumed the power to grant; and nothing appearing to the contrary of the existence of the power in that body, and the concession made at Havana not being opposed to the royal order of January, 1813, and there being no occasion in this case to inquire into the power of the Provincial Deputation, we have treated the testimonial as emanating from the proper authority, leaving the point open to future inquiry, should an occasion call for it, and positively require us to decide whether the Deputation had the power assumed. It was necessary to state thus much of the case, and of the then state of the Spanish tribunals and history, preparatory to discussing the effect of the proofs intended to establish that the grant had in fact been made.

“Jose Leal, representing himself as a notary at Havana, certifies that on the 13th of January, 1814, he had recorded the original memorial of Arrambide, and the documents accompanying the same, with the testimonial and concession, a record of which he testified in presence of two witnesses. This record purports to have been made pursuant to the order of the Captain-General, on the petition of Arrambide.

“Thus authenticated, the testimonial of the grant appears to have been presented to the Council of East Florida; but none of the accompanying documents, so far as can be seen, or inferred from the record before us, were presented.

“On the 1st day of February, 1814, the Council acted upon the testimonial, but granted lands at a different place from the one therein expressed.

“On the 3d of June, 1815, Entralgo, the Secretary, says, ‘This is a copy.’ And on the 6th of June following, Ygninzz and Lopez, styling themselves Royal Collector and Treasurer, certify to the official character of Entralgo.

“How far the forms of these certificates could have been called in question in the Superior Court it is difficult to say. No objection, however, on the hearing in that court, was made to the introduction of the testimonial given the interested party at Havana, nor to the resolution taken thereon by the Council of St. Augustine, and we, therefore, do not feel ourselves justified in rejecting them on this appeal,

because of the informality in the evidence adduced to the court below of their existence in the public archives of Florida. The claim had been presented to the American Commissioners years before without objection to the existence of the title by the Board, so far as we are informed. But we chiefly rely on this, that from the nature and great extent of the claim, if such an objection had been well founded or even suspected, it is fair to presume the counsel for the government of the United States would have interposed and demanded of the Superior Court, on the hearing, the rejection of the claim, on the ground that the evidence did not establish its existence.

“From anything that appears to the contrary, the originals of the proceeding had before the Council of St. Augustine, in 1814, may have been before the court, and admitted in evidence without objection. Furthermore, the authenticity of the testimonial made in Arrambide's behalf, at Havana, was sanctioned by the Council of St. Augustine in March, 1814; that was the tribunal to judge of its character as evidence, and having been treated as an existing and authentic act, this court cannot with any propriety, at this day, hold otherwise, especially as not the slightest suspicion attaches to the authenticity of the title papers, such as they are found on the record.

“3. Having disposed of the exceptions taken to the existence of the title, we will next inquire what the effect of the testimony was. We will take for granted that the papers on their face, considered in connexion with the royal order of January 4th, 1813, sufficiently establish the fact, that the power to grant, at the particular time when the grant was made, was in the Provincial Deputation at Havana, and not in the Council of the City of St. Augustine. The Council had imposed on it the duty ‘to despatch the corresponding title’ to the lands granted by the Deputation. And to this end, and with this request by the petition of Arrambide, was the testimonial laid before the Council in the present instance.

"After the title in form was despatched, the proceedings were to be returned to the Provincial Deputation, conforming in this respect to the 12th and 17th articles of the royal order. The resolution of the Council must, therefore, found itself on the testimonial. The Provincial Deputation stated to the Council 'that they granted, in property, to Arrambide, two leagues square to each point of the compass, of the lands he may choose, from the mouth of New River, which discharges itself on the coast of East Florida, and through Puerto Largo, on the south part, following the same course to the sea-shore, conforming as near as possible to the said decree.' New River, and the inlet through which it passes into the ocean, are well known in the geography of East Florida, lying north of the twenty-sixth degree of latitude, on the eastern coast, Fort Lauderdale being now established at the mouth of that river.

"From the mouth of this river the interested party was authorized to choose the land, and we apprehend it was to be taken on the south part of the river, and was certainly to lie partly on the ocean.

"On the 1st of February, 1814, Arrambide, by his petition, dated at Havana, solicited the Council of the City of St. Augustine, to expedite to him the title in conformity to the grant of the 4th of December, 1813, in the territory of the province of East Florida, and on the south part thereof. 'The testimonial leaving,' says he, 'to my choice, the place where I should settle myself, and desiring to possess two leagues to the mouth of the River Miamirs, which is at the northwest side of Largo Byseayno, I pray your Honors to be pleased to expedite to me the corresponding title of property for the two leagues of land to each point of the compass, agreeably to this situation, reserving to myself to produce the plat of the said lands, as soon as I find myself prepared to take it out, to commence the establishment which I am to effect.' The Miamirs is a river also well known in the geography of East Florida, and lies about one degree of latitude south of the New River, and at the mouth of which is now Fort Dallas.

“The grant made at Havana was ‘with the object of establishing on it mills for sawing timber;’ such was the representation made by Arrambide to the Deputation as we are bound to infer from the papers adduced, although the representation does not appear in the record.

“No survey has ever been made at the mouth of New River, nor could any be made unless ordered by the Council of St. Augustine, nor has the proposed establishment been made at that or any other place.

“On applying to the local Council of East Florida, Arrambide abandoned his first location, and claimed to select another in the neighborhood of a river lying sixty or seventy miles further south. Of the abandonment there can be no doubt. No claim is set up in the petition for the land at the mouth of New River as granted by the Provincial Deputation.

“To the grant at Havana, the rule applies which was laid down by Saavedra, at the command of Governor Coppinger, in answer to the inquiries of the agent of the Duke of Alagon, and recited in the case of the *United States v. Clark*, 8 Peters, 461, that ‘the assignments of extensive portions of territory, which have been made for the establishment of factories to persons who did not then comply, nor have since presented themselves to establish their mechanical works, ought also to be considered without any right or value, and said lands perfectly free, that they may revert into the class of public lands.’ The opinion and report, from which the foregoing is an extract, was recognised as authority by this court in the case of the *United States v. Wiggins*, 14 Peters, 351, and we imagine its accuracy is indisputable. We therefore think from the facts presented by the record, as also by the laws of Spain, the grant made at the mouth of New River, by the Provincial Deputation, imposed no obligation on the government of Spain at the date of the treaty of 1819, to confirm the title to Arrambide, and that none rests on the government of the United States as the successors to the rights and obligations of Spain.”

"4. Did the concession made by the Council of St. Augustine confer any title? It was professedly made in conformity to the authority of the testimonial and decree of the Provincial Deputation of Cuba, and could only be intended to expedite the former title. The Council neither had, nor professed to have, in itself, the power to make a new and independent grant to Arrambide, thereby disregarding the commands of its superiors, and of the laws and regulations recently adopted for the government of the provincial authorities when granting lands. The concession was therefore void for want of power in the tribunal that assumed to make it.

"This court say, in the case of the *United States v. Clarke*, 8 Peters, 454, 455, that the royal order of the 4th of January, 1813, founded on the decree of the Cortes, seems to have been repealed on the 22d of August, 1814. That it was annulled by the King about that time there can be no doubt, and it may be the title of Arrambide would not have been recognised by Spain after the repeal. So it may have been impossible for him to make the survey or return the proceedings to the Deputation of Havana according to any known law after the repeal; that he had no time to do so between the 22d of March, 1814, when the Council made the concession, and the 22d of August of that year, when the repeal took place, may be safely assumed; yet with the very slight information we have on this subject, and of those times in the history of Spain, it has been deemed proper not to institute an inquiry into the effect of the repeal of the royal order of 1813.

"The decree below is for a square of land of twelve English miles, the centre of the tract to be two leagues from the sea-coast, the lines of the survey to be to the cardinal points of the compass.

"The petition of Arrambide asked of the Council of East Florida two leagues to each point of the compass, 'to the north of the River Miamirs.' That the land was to have been selected in the neighborhood of some part of the river,

and north of it, is sufficiently plain; but whether near the ocean, or near what other part of the river, does not appear, and for an obvious reason the grantee reserved to himself 'the right to produce the plat of the said lands, as soon as he found himself prepared to take it out, and to commence the establishment he was to effect.' This was never done, and no particular lands could have been decreed to Arrambide had the Council of St. Augustine possessed the power to grant. The doctrine on this subject is stated in several cases decided at the present term, and which need not be repeated. It was not possible for the Superior Court to locate any land, as no particular spot was granted: lands not previously granted were by the treaty vested in the United States as part of the public domain; the public domain cannot be granted by the courts; this the decree below attempted to effect; and on this ground, was there no other objection to the decree, it should be reversed, which is ordered, and that the petition be dismissed."

§ 315. The authority of the Governors of Florida to grant lands of the crown extended to all the public domain of the crown within the limits of the province. A question has been made, however, whether this authority extended to lands which were in the occupation of the Indians at the time of the grant. This point was first presented in the case of Arredondo, in which the lands granted were within the Indian boundary, the centre of the grant being an Indian town. But it appeared in that case that there had been a proceeding, known to the Spanish colonial laws, in the nature of an inquest of office at the common law, by which the lands in question had been declared to be annexed to the royal domain by the abandonment of the Indians, and that the grant had been made subject to the Indian right of occupancy, if they should return. The court held that, the effect of this proceeding, according to the Spanish law, was, that if the abandonment was voluntary, the dominion of the crown over the land was perfect; but that if the Indians

had been driven away by force, they had a right to return for the purpose of occupancy. As the abandonment had been found by a judicial proceeding, it was regarded as *res adjudicata*, and the title of the grantee of the crown was confirmed.¹ This, however, did not determine the question of the authority of the crown to grant lands still in the occupation of the Indians, and where the Indian title had not been extinguished.

§ 316. Mitchell's case, which was the next in order of time, was the case of an original grant made by the Creek and Seminole Indians in East Florida, of lands which had not reverted or been ceded to the crown. Before the cession of the Floridas to the United States, treaties made with these Indians by Spain and by Great Britain had guaranteed to them not only the right of possession of their lands, but the right of alienation of that possession, subject to the ratification and confirmation of the crown. These treaties were held to be obligatory upon the United States; and as the Indian grant had been confirmed by the Spanish authorities, it was held to have conveyed a complete title.² But the broad question of the validity of an original grant, by the governor, of lands within the Indian boundary, which had not by any official act been decreed to form a part of the royal domain, was not touched by this case. It was considered that the sale by the Indians transferred the kind of right which they possessed, that is, the perpetual right of occupancy, and that the ratification of the sale by the governor must be regarded as a relinquishment of the title of the crown to the purchaser, or the ultimate fee.

§ 316 a. But the nature of the title of the crown and the authority of its officers over lands in the possession of the Indians were settled by the subsequent case of Fernandez. It does not appear, expressly, from the report of this case,

¹ The United States v. Arredondo, 6 Peters, 747.

² Mitchell v. The United States, 9 Peters, 711.

whether the lands in question were or were not affected by the Indian treaties. But, as they lay in East Florida, it is to be presumed that the Indian title was the same as in the preceding case; and as the grant of the governor embraced lands within the Indian boundary, it operated upon lands of which the Indians had the right of occupancy. To this case, the court applied the doctrine which had been settled with great consideration in the case of *Johnson v. Macintosh*, in relation to the right, exercised by all the European governments, of granting lands in the occupation of the Indians. That doctrine is, that the principle recognised by all European governments, from the first settlement of America, gave the ultimate title to the discoverers, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.¹ So that a title derived exclusively from the Indians, without the sanction of government, is invalid; and a title derived from the government is subject to the Indian title of occupancy, which can be extinguished only by the government, or by its authority. In Florida, there does not appear to have been any restriction on the powers of the Spanish governors to make grants of land, other than those imposed on the governor under Great Britain; both made grants without regard to the land being in possession of the Indians; those grants were valid to pass the right of the crown, subject to their right of occupancy; when that ceased, either by grant to individuals, with the consent of the local governors, by cession to the crown, or the abandonment of the Indians, the title of the grantee became complete. On the general question, therefore, of the validity of grants of lands in East Florida in the possession of the Indians, the Supreme Court declared that they were good to pass the title of the crown; the grant of the governor severed them from the royal domain, so that they became private property, which was not ceded to the United States by the treaty with Spain.²

¹ *Johnson v. Macintosh*, 8 Wheaton, 543.

² *The United States v. Fernandez*, 10 Peters, 303.

§ 317. The grant itself having been issued by the proper authority, the next question that arises, is, as to its construction. This involves the inquiry, whether it was a grant in absolute property, made for a past consideration, or on a condition precedent, or whether it was made upon a condition to be performed subsequently. Grants in absolute property were those made in consideration of some service, or other merits, or losses, recited in the petition and decree thereon. And it has been held, that where the party asked for a grant of land in consideration of services, to be used for the erection of a saw-mill, and the grant was in form in absolute property, that the services must be taken as the consideration on which the grant was made, and that no condition was to be implied from the fact that the petitioner asked for land for the purpose of building a saw-mill. In this case, the court observed, "It has been suggested that though there was no express condition in the grant, one was implied from the consideration in part being the erection of a saw-mill. But we cannot attach any condition to a grant of absolute property, in the whole quantity. It was exclusively for the governor to judge of the conditions to be imposed on his grant. He appears to have considered the services of the appellee a sufficient consideration, and made the grant absolute."¹

§ 318. But there were numerous cases where the grants were made upon conditions; and these conditions were of two kinds, express or implied. Grants were made upon an implied condition, where there was some general regulation, or ordinance, fixing the number of acres to be granted for each person in the petitioner's family, or the time when cultivation or occupancy should be commenced, or any other

¹ The United States *v.* Segui, 10 Peters, 306. See, also, to the same point, The U. States *v.* Robinson, 15 Peters, 130, 138; Same *v.* Hanson, 16 Peters, 196, 198. In this last case, it was declared that no special ordinance introduced conditions into mill grants, and, therefore, the grant in question was to be construed by its own terms. See also for an absolute grant, The U. States *v.* The Heirs of Clarke and Atkinson, 16 Peters, 228.

matters with which the grantees of the public lands were to comply. In cases, therefore, where the concessions did not expressly prescribe conditions on these points, they were to be presumed to have been made with reference to the general regulations; and the provisions of those regulations constituted the implied conditions of the grants. Thus, in *Wiggins' case*, no time was specified in the concession for the settlement upon the land, and it was held that the United States might take advantage of the non-performance of the condition in respect to settlement prescribed by the general regulation, and implied, therefore, in the grant.¹ So, too, in *O'Hara's case*, where the decree of concession granted to the party the lands solicited "until the time when, in conformity to the number of workers he may have to cultivate them, the corresponding number of acres may be surveyed to him," and that possession should be taken in six months from the date of the decree; and a month after that date the governor promulgated a general order regulating the number of acres to be granted for each member of a family; and it did not appear that the party had ever made a settlement: it was held that the regulation determined what the governor intended to grant, and that the right to any particular number of acres had never become vested by reason of the omission of the party to fix the number by settling a given number of persons upon the land.²

¹ *The U. States v. Wiggins*, 14 Peters, 334, 349.

² *O'Hara v. The U. States*, 15 Peters, 275, 281. In this case, the court said, "It is a decree, then, not granting fifteen thousand acres, as is asked for, but so much in the place where it is asked for, as shall be surveyed, in conformity to the number of workers he may have to cultivate the land, and as to what the quantity should be, there is no uncertainty, for we have the regulation of Governor White, promulgated by him the month after the date of the decree, which states to each head of a family of a new settler there shall be granted fifty acres of land, and an equal quantity to a single person, widow, or widower, and to the children of slaves of sixteen years of age, twenty-five acres each. This regulation, then, determines, in that respect, what the governor intended to grant, and the conclusion that the grant was to be in conformity with the regula-

§ 319. As to the express conditions introduced into these grants, they were sometimes precedent, and sometimes subse-

tion, cannot be shaken by the suggestion that the decree was made before the date of the regulation, as it might be, if the grant had been for fifteen thousand acres in terms. There is no grant for any quantity. When it is found that the decree is restrained to a right to be determined by the number of workers which the memorialist shall have, that the governor had the power to make a grant with such a restriction, and that so shortly after the decree was made, as the following month, he promulgated a general rule for grants to new settlers, the inference is good, until it is contradicted by some other fact, or other regulation applying to new settlers, that the memorialist was to take under the decree in his favor, as contemporary new settlers would have to take. The memorialist never made a settlement. The witness, Marion, says he did attempt a settlement; that a house was built; and that O'Hara informed him he had employed a carpenter to build it; but the memorialist never took his family nor negroes to the land. The construction of a house was no compliance with the condition of the grant. That act itself could not, under the regulation, give a right to any number of acres. The right vested upon the persons, black and white, who might be carried to make a settlement. The house is good evidence of an intention to settle with persons; but if the evidence discloses the fact that no persons or workers were ever taken to it; that cultivation was not begun, the inference is made the stronger, that the rights of the memorialist under the decree were abandoned.

"The record discloses an attempt by the memorialist immediately after the decree of the governor, to get negroes from Jamaica for a settlement; and that the vessel in which they were embarked was taken into Savannah and libelled in Admiralty; but the proceedings in Admiralty do not show that the memorialist was deprived ultimately of the negroes; and if he was not, and the negroes were restored, no cause is shown why they were not taken to Florida. But if they were not restored, it will scarcely be contended that an unfortunate attempt to carry negroes to take possession of the land, fulfils the intention of the grant, the quantity of which is to depend upon the number of workers actually employed in cultivation. But there was not only a failure to settle in this case, there was an actual abandonment. We hear nothing of the memorialist, or of any attempt to settle the land from the spring of 1804 until 1819. There never was a survey of any land by authority, though one is alluded to, until March, 1819; and that was made without the order of the Spanish authorities in Florida. Indeed, it was done against authority; for we find from the testimony in the cause, that O'Hara petitioned Governor Copinger on the 20th April, 1819, within a few months of sixteen years

quent; and whether one or the other, has often been a matter of construction. Thus, in Arredondo's case, an absolute grant was made, with the condition that the petitioners should "establish thereon two hundred families, which ought to be Spanish, with all the requisites which are provided for, and others which will be provided by this superintendency, in virtue of the said royal order; the said establishment to begin to be carried into effect in the term of three years, at farthest, without which this grant will be null and void." The establishment contemplated was commenced within the time required, but the performance of the condition of settling two hundred Spanish families upon the land became impossible, by reason of the cession of Florida to the United States. It was held that this was a condition subsequent, and that as the party had complied as far as was in his power, and a full compliance had become impossible by the act of the grantor, the *cy pres* doctrine of a court of equity was to be applied to save a forfeiture, the grant itself being a full property in fee, and carrying an interest which could only be divested by a breach or non-performance of the conditions.¹ But

after Governor White's decree had been given upon his memorial, for an order of survey upon the decree, and that it was refused. We have, then, in this fact a denial of the memorialist's right to the land by a Governor of Florida. There can be no doubt it was looked upon by Governor Coppinger as abandoned, and that the right to the same was lost under the 9th article of Governor White's regulations, already spoken of as contemporary with the decree upon the memorial of O'Hara, 2 White's New Rec. 278. It is not necessary for us to speak of a subsequent attempt by O'Hara to introduce negroes into Florida in 1819, and its failure. This right to the land originally asked for had ceased; he could make no claim under the decree of September, 1803; and a revival of the old grant by the Spanish authorities would have been substantially a violation of the treaty with Spain which only confirms grants made before the 24th January, 1818."

¹ The U. States *v.* Arredondo, 6 Peters, 691, 745. Upon this point, the court said: "We now consider the conditions on which the grants were made. According to the rules and the law by which we are directed to decide this case there can be no doubt that they are subsequent, the grant is in full property in fee, an interest vested on its execution which

where the grant was on the condition precedent, that the grantee build a mill within the period fixed in the grant, and

could only be divested by the breach or non-performance of the conditions, which were, that the grantees should establish on the lands two hundred Spanish families, together with the requisites pointed out, and which shall be pointed out by the superintendency, and begin the establishment within three years of the date of the grant. No time was fixed for the completion of the establishment, and no new requisites or conditions appear to have been imposed. From the evidence returned with the record, we are abundantly satisfied that the establishment was commenced within the time required (which appears to have been extended for one year beyond that limited by the grant), and in a manner which, considering the situation of that country, as appears by the evidence, we must consider as a performance with that part of the condition. Great allowance must be made, not only from the distracted state and prevalent confusion in the province at the time of the grant, but until the time of its occupation by the United States. Though a court of law must decide according to the legal construction of the condition, and call on the party for a strict performance, yet a court of equity, acting on more liberal principles, will soften the rigor of law, and though the party cannot show a legal compliance with the condition, if he can do it *cy pres* they will protect and save him from a forfeiture: 4 Dall. 203; 2 Fonb. 217, 218, 220; 1 Vern. 224, 225; 2 Vern. 267 and note. The condition of settling two hundred families on the land has not been complied with in fact; the question is, has it been complied with in law, or has such matter been presented to the court as dispenses with the performance and divests the grant of that condition.

"It is an acknowledged rule of law that if a grant is made on a condition subsequent, and its performance becomes impossible by the act of the grantor, the grant becomes single. We are not prepared to say that the condition of settling two hundred Spanish families in an American territory has been or is possible; the condition was not unreasonable or unjust at the time it was imposed; its performance would probably have been deemed a very fair and adequate consideration for the grant, had Florida remained a Spanish province. But to exact its performance after its cession to the United States, would be demanding the '*summum jus*' indeed, and enforcing a forfeiture on principles which, if not forbidden by the common law, would be utterly inconsistent with its spirit. If the case required it, we might feel ourselves, at all events, justified, if not compelled to declare, that the performance of this condition had become impossible by the act of the grantors, the transfer of the territory, the change of government, manners, habits, customs, laws, religion, and all the social and political relations of society and of life. The United States have not

the grantee had neither performed the condition, nor shown sufficient cause for its non-performance, it was held that there was no ground for the application of the equitable principles which excuse the performance in the whole or in part.¹ So, too, where the concession made it the duty of the party to produce the plat and demarcations of the land "in proper time," it was held that the execution and return of the survey to the proper office was a condition precedent to the severing of the land granted from the public domain.² So, too, where the memorialist prayed for a grant, promising to make a settlement within a certain time, and it did not appear that any other inducement led to the concession, and the settlement was not made within the time limited, it was held that the right was forfeited for non-compliance with the conditions of the grant.³

§ 320. With respect to the time within which conditions contained in the Florida grants were to be performed, it is to be observed that by the 8th article of the treaty the owners or holders of these inchoate grants were allowed the same length of time from the date of the treaty, for performance, as was limited in the grants. It was determined

submitted this case to her highest court of equity on such grounds as these; we are not either authorized or required by the law, which has devolved upon us the final consideration of this case, to be guided by such rules, or governed by such principles, in deciding on the validity of the claimant's title. Though we should even doubt, if sitting as a court of common law, and bound to adjudicate this claim by its rigid rules, the case has not been so submitted. The proceeding is in equity. According to its established rules, our decree must be in conformity with the principles of justice, which would, in such a case as this, not only forbid a decree of forfeiture, but impel us to give a final decree in favor of the title conferred by the grant."

¹ *The United States v. Kingsley*, 12 Peters, 476, 482; *Same v. Mills' Heirs*, *Ibid.* 215; *Same v. Drummond*, 13 Peters, 84; *Same v. Burgevin*, *Ibid.* 85.

² *The United States v. Forbes*, 15 Peters, 173, 183.

³ *Buyck v. The U. States*, 15 Peters, 215. See, also, *U. S. v. Delespine*, *Ibid.* 319.

in Arredondo's case, that the treaty, as to individual rights, was to be considered as dated at its ratification, which was on the 24th of October, 1820.¹ Where a concession was made on the 2d of August, 1816, on condition that until the establishment of a mill upon the land the grant should be of no effect, but not limiting the time for performance, and the party commenced the erection of a mill in 1819, when his negroes and horses were stolen, and the dam was carried away by a freshet, and, in 1827, another mill was built and put in operation, but was destroyed by fire, and, in 1828-9, a third mill was erected, and was in operation at the time of the hearing; but, on the 29th of October, 1818, the governor had made an order, declaring all grants made, in consideration of future mechanical improvements, to be void, if the conditions were not performed within six months;—it was held that no greater effect was to be given to this order, than if the same limitation had been introduced into the grant, and, therefore, that as the party had commenced the erection of a mill in 1819, but had been interrupted by an overwhelming force, it was a performance *cy pres*, and in time to save a forfeiture, according to the rules of equity governing these cases.²

§ 321. And this leads us to the consideration of another rule, on which a large class of these cases has been decided, and which relates to the construction of the grant or concession, with respect to the location and survey of the lands. At the time when the treaty took effect, there were different classes of these cases, some of them having been surveyed and located upon the paper title previously obtained, and others not having been surveyed and located, but a paper title being in the possession of the claimants. The Act of 1824, under which these proceedings are had, directed the courts to decide all questions relative to the validity of the title, and to the extent, locality, and boundaries of the

¹ 6 Peters, 748, 749.

² *The United States v. Sibbald*, 10 Peters, 313, 321.

claim. In the first class of cases, therefore, the question as to the validity of the claim, or, in other words, the question, whether the land claimed had been, before the date fixed in the treaty, severed from the public domain by a grant to which the United States were bound to give effect, involved the inquiry, whether the land authorized by the grant to be surveyed and appropriated, was the land which the claimant had in point of fact surveyed, and which he claimed to hold. But, in regard to the class of cases where no land had been surveyed, and the grant had not been located, the question was, whether the grant was capable of being located by a survey which would identify the land described in the grant. The rules of construction, adopted in cases of both classes, must, therefore, be to some extent the same.

§ 322. The regulations for granting lands in Florida, by the Spanish authorities, required that grants should be made in a certain place, and there were no floating rights of survey out of the place designated in the grant, unless the land granted could not be got there in its entire quantity, and an equivalent was provided for.¹ In the principles which the Supreme Court have followed, for determining the locality of these grants, they have not adhered to the rules of the common law of England, which make grants of the king void for uncertainty, but they have applied the laws and ordinances of the government under which the claim originated, and the rule, which is of universal application to grants, and essential to their validity, that the thing granted should be so described, as to be capable of being distinguished from other things of the same kind, or be capable of being ascertained by extraneous testimony.²

§ 323. Thus, in determining on the locality of the grants, the court has looked into the description of the grant for some natural or artificial point, as the monument from, or in

¹ As in *Sibbald's case*, 10 Peters, 313, 12 Peters, 488.

² *Buyck v. The United States*, 15 Peters, 215, 223, 224

reference to which the location can be made. If the grant contains no reference to any natural or artificial object, which can be taken as such a point, or if it refers to or designates objects which cannot be found, it cannot be located; and whether there has or has not been a survey before the party applied for confirmation of his claim, the party can take nothing under the concession; for in the one case he has taken land which there are no means of showing that he was authorized to take, and in the other case, the court itself would grant a part of the public domain, which had not been previously severed by any definite description.¹

§ 324. Thus, in *Arredondo's case*, where there had been no survey, the court said that the want of it did not interfere with the right of the party to the land granted, but that it must be taken as near as might be, as it was described in the petition, where it was asked for, and could not be taken elsewhere; that if the points indicated for a survey could not be found, the description was too indefinite for a survey, and the claimant could take nothing by the concession. In this case, the court found that the concession called for a natural object, where it was designated as commencing, about seven miles west of a certain Indian town.²

¹ *Buyck v. The United States*, 15 Peters, 215, 224; *The United States v. Delespine*, 15 Peters, 333; *Same v. Miranda*, 16 Peters, 153, 156, 157; *Villalobos v. The U. States*, 10 Howard, 541, 557.

² *The United States v. Arredondo's heirs*, 13 Peters, 133, 134. In this case, the court said: "It does not appear by the record that a survey was made of this concession, whilst Florida continued a province of Spain, or that it has since been surveyed. Nor does it appear by any evidence in the cause that the locality of the concession has been definitely ascertained.

"We do not consider the want of a survey as interfering with the right of the party to the land granted, but it must be taken as near as may be, as it is described in the petition, where it was asked for, and it was granted, and cannot be granted elsewhere. If it cannot be found there, the appellants have no claim to an equivalent; or if, upon the survey, it shall be found to interfere with previous grants to third parties, the

§ 325. So, too, where, by a concession, the land was required to lie on a stream, which was sufficiently desig-

concession will be lessened in quantity according to the extent of the rights of third parties, and an equivalent for such diminution cannot be surveyed elsewhere.

"Such are the terms of the concession, that the land is to be surveyed 'in the place where the petitioner designates, without prejudice to a third party.' It gives no right to an equivalent or another location, if it cannot be found at or near the place designated. An equivalent is not secured by the concession in terms; nor is it by the custom or usages of Spain, nor by any law or ordinance of Spain. And it is proper here to remark, that the acts of Congress, for ascertaining claims and titles to land in Florida, whilst they recognise patents, grants, concessions, or orders of survey, as evidence of titles, when lawfully made, do not permit, in case of a deficiency in the quantity from any cause whatever, the survey to be extended on other lands. But this occasion calls for a natural object, a creek, and is designated as beginning on the creek, about seven miles west of an Indian town, called Alligatortown. A survey may then be made, so as to give the appellees the benefit of the concession, according to the description in the petition, supposing that Alligator Creek exists, and that Alligatortown can be found; for by running a line due west from the centre of the town until it strikes the creek, then extending that line west for a base line of the survey, making the centre of the creek equidistant from its extremities, and then running down the creek on both sides of it, towards the Sawannee, without regard to the windings of the creek being cut by the downward lines, the connexion may be described by the survey, so as to answer the description of being on the two banks of the stream or creek. Or in the event of no such creek existing within or at the distance of seven miles from Alligatortown, or at a reasonable distance over seven miles to the west of it, then by beginning the survey seven miles west of the town, making a line due west the base of the survey, and running from its extremities towards the Sawannee, the rights of third parties would be interfered with, then the survey of thirty-eight thousand acres could be made so as to give the appellees the benefit of the concession, in accordance with those liberal and equitable principles uniformly applied by this court in the construction of claims in land to Florida, granted before the treaty with Spain transferring Florida to the United States. If, however, neither Alligator Creek can be found, nor any creek to the west of Alligatortown, entering into the Sawannee, within or at seven miles distance from the town, or a reasonable distance therefrom, and if Alligatortown cannot be found, then it is the opinion of this court that the remaining description in the petition, of the locality of the conces-

nated, and the survey was to commence "four or five miles from the St. John's," and the land which had been surveyed lay on the stream, but its distance from the St. John's did not appear, it was held that the survey did not conform to the title, although the paper title was valid.¹ In like manner, where the survey had been made, and the land located according to the description of the grant, and a part comprehended within the survey was found to be covered with water, and to consist of marshes; and the assignee of the original grantee prayed for a survey to comprehend the requisite number of acres of land clear of water and marsh, the court held that to designate a new location, varying from the original concession, would be equivalent to a new grant, which was not within the power of the court.² And where a survey of part of the number of acres granted had been made at a different place from that described in the original concession, and the survey was made after the date fixed in the treaty, prior to which grants were confirmed by the treaty, although the original concession was made before that date, the court held that the survey would, if confirmed, be a new appropriation of so much land, and would have been void, if ordered by the Governor of Florida, and was, of course, void, it having nothing to uphold it but the act of the surveyor-general.³

sion, is too indefinite to enable a survey to be made, and that the appellees can take nothing under the concession."

¹ *The United States v. Levi*, 8 Peters, 479, 481. See also *The United States v. Huertas*, 9 Peters, 171.

² *The United States v. Levy*, 13 Peters, 81, 83. In this case the claimant undertook to show a custom of the Spanish government of East Florida, to exclude land covered with water from the survey, but failed to prove it. The court said that it would have made no difference had it been proved, as a new location would be a new grant. See also *Villalobos' case*, 10 Howard, 541.

³ *The United States v. Breward*, 16 Peters, 143, 146. See also *Seton's case*, 10 Peters, 309, 311. The Surveyor-General of Florida had no authority to change the location of a grant, and split up the surveys. *The United States v. Huertas*, 9 Peters, 171; *Same v. Levy*, 13 Peters, 83; *Same v. Forbes*, 15 Peters, 173; *Villalobos v. The United States*, 10 Howard, 541, 556.

§ 326. There has also been a class of cases, where the original concessions have contained uncertain designations of the place, but the place has been described as within a wide extent of country, or within a large area of natural or artificial boundaries, but without such designations as would give a place of beginning for a survey. In these cases, where no survey had been made before the 24th of January, 1818, although the original concessions, or decrees of the Governor, granting the land prayed for, had been made before that date, they have been held void, upon the ground that the concession was so uncertain that locality could not be given to it.¹ In this class of cases, the Supreme Court

¹ The United States *v.* Miranda, 16 Peters, 153, 156. In this case the Supreme Court said: "Two considerations are decisive of its invalidity. The grant is void, no land having been severed from the public domain previous to the 24th January, 1818, and because the calls of the grant are too indefinite for locality to be given to them. The petitioner asks for 'a square of eight leagues in the royal lands which are found on the waters of Hillsborough and Tampa Bays.' The grant is, 'I grant to him, in the terms which he solicits, the said quantity of land in the places which he indicates.' Tampa or Espiritu Santa, as it was known or called before Florida was ceded to the United States, is the largest on the Gulf of Mexico. It is at least forty miles long, and, in one or more places, from thirty to forty miles broad. Hillsborough River empties into it from the north. To the southeast of Hillsborough River are the Indian and Alafia Rivers. Lower down the bay on the same side, is Manali River, from sixteen to twenty miles wide at its mouth; and Oyster River is twenty miles below the Manali. The eastern part of this bay was by the British called Hillsborough, and the little bay attached to the north side Tampa. The little Tampa is an elliptical basin, about ten miles in diameter. There are many islands in the bay, especially on the western part and at its mouth, and Tampa extends to Saragossa Bay. Williams' Territory of Florida, page 24.

"Where, in this extensive area, shall the grant be located? Shall it be on either of the rivers emptying into the bay? On the eastern or western side of the bay? At its head or at its mouth? Shall it be a contiguous body of land on Hillsborough Bay, or on Little Tampa? or shall it be divided in equal parts in both, if the grantee claims a right to survey on Hillsborough and Little Tampa as the places indicated in his petition? then it cannot be taken in a single body 'of a square of eight leagues;' for the former being on the east part of the bay, and the

have considered that no specific land was granted, or intended to be granted; but that it was left to the petitioner

latter on the north side, neither the dimension nor form of the grant could be surveyed touching on both. And this, whether it is to be taken in a square of four equal sides, or in a rectangular parallelogram with a part of one-third of the bay, which last is the mode prescribed by the Spanish authorities for surveys on navigable waters. Shall it be left to the grantee to choose? or shall the court arbitrarily fix upon a point for the beginning of a survey? If there were a starting-point, the claimant might, putting aside the other question in the case against the confirmation of the grant, be entitled to a survey. But there is none. No survey was made under the grant whilst Florida belonged to Spain. Indeed, it appears from the record, that neither the Governor making the grant, nor any other Governor of Florida after him, ever gave an order for a survey of this grant. The grantee though all the time in Florida, from the time when the grant was given, until the treaty with Spain was made, a period of nine years, did not apply, or, if he did, did not receive from the authorities of Spain an order for a survey. The case shows that in other grants of land made to him subsequently to the date of that now under consideration, and there are nine or ten of them in the record, page 81 to 93 inclusive, that Miranda uniformly had them consummated by a royal title. And it is also worthy of remark, that he states in his petition to Governor Coppinger, on the 16th of September, 1817, after reciting his services from 1794 to 1812, in the defence of the province, and that he had had in his charge divers extraordinary commissions, he states, 'for which he had never had any compensation whatever.' What, then, had become of his grant for a square of eight leagues in the royal lands which are found on the waters of Hillsborough and Tampa Bays? The locality, then, of the premises was not acknowledged by the authorities of Spain. No effort was made to give identity to the grant before the treaty was ratified. Is such a grant protected by the treaty? We think not. The eighth article of the treaty is, 'all the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authority in the said territories, ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid, if the territories had remained under the dominion of his Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them, within the times limited in the same, respectively, from the date of this treaty, in default of which the said grant shall be null

to have a survey made of the land in the district referred to by the concession, by the surveyor-general of the pro-

and void. All grants made since the 24th of January, 1815, when the first proposal, on the part of his Catholic Majesty, for the cession of the Floridas was made, are hereby declared to be null and void.' The words in the foregoing extract 'shall be ratified and confirmed to the persons in possession of the land,' have been decided by this court, in *Percheman's case*, 7 Peters, 51, to mean, 'the grants shall remain ratified and confirmed to the persons in possession of them, to the same extent,' &c. &c.; or, as this court said in *Kingsley's case*, 12 Peters, 476, 'stand ratified and confirmed to the same extent, that the same grants would be valid, if Florida had remained under the dominion of Spain.' And the words, 'in possession of them' have by this court, in *Arredondo's case*, 6 Peters, 741, and in other cases, upon Florida grants, after it, been determined not to imply occupation or residence only, but a legal seisin. The court said in that case, 'By grants of land we do not mean the mere grant itself, but the right, title, legal possession, and estate, property, and ownerships legally resulting upon a grant of land to the owner.' But, in the case before us, from the want of a survey, or some point for the beginning of one, there can be neither a seisin in fact, nor in law; for identity of premises is as essential for a seisin in law, as it is necessarily implied in a seisin in fact. The grantee, then, can only claim validity for this grant to the same extent that it would have been valid, if the territories had remained under the dominion of his Catholic Majesty. And this brings up the question, How far this grant was valid when the Floridas were ceded to the United States? or whether, in the situation in which the grantee stood when the treaty was made, he had more than a permission to ask for the means of having the lands identified, that he might have a right of possession? The grant was made in 1810. No order of survey was made; nothing was done to withdraw the land from the general mass of property, or to show what it was which was to be drawn. It, therefore, remained in the King of Spain, with the power to consummate that which had been done on *Miranda's* petition into a complete title, according as it might be his pleasure to do or not to do so. And when he ceded the Floridas to the United States, the latter were placed in respect to this grantee exactly in the situation in which his Catholic Majesty had stood. This being so, the eighth article of the treaty, on the most liberal interpretation of the intentions which actuated the high contracting parties, imposes upon the United States no obligation to make a title to lands of which the grantee had neither an actual seisin, nor a seisin in law. Identity is essential for the latter, and has uniformly been in the contemplation of this court, when it has confirmed Florida grants inchoate or complete.

vince, in due form, on the ground, and to cause the plot and certificate of such survey to be recorded by the surveyor-general, by which additional public act the land granted would be severed from the king's domain. Until this was done, a grant of this description was a floating warrant of survey, not recognised by the government of Spain before

This court in Forbes' case, 15 Peters, 182, said: 'The courts of justice can only adjudge what has been granted, and declare that the land granted by the lawful authorities of Spain are separated from the public domain.' The grant now sought to be confirmed was not so separated by survey, or by any such distinctive call, as will admit of a survey. In Forbes' case, just mentioned, the grant was for land 'in the district or bank of the river Nassau;' and the court say, after noticing the uncertainty of the description for the location of the land, 'No survey of the land granted was ever made, the duty imposed upon the grantee to produce the plot and demarcations in proper time, was never performed. This was a condition he assumed upon himself: the execution and return of the survey to the proper office, in such case could only sever the land granted from the public domain.' 'No particular land having been severed from the public domain by John Forbes, his was the familiar case of one having a claim on a large section of country unlocated,' &c. &c. 'In such a case the government has ever been deemed to hold the fee unaffected by a vested, equitable interest, until the location was made according to the laws of a particular country.' And though in the decree granting the land to Forbes, the Governor says, 'It will be the duty of the party to produce the plot and demarcation in the proper time,' it does not vary the principle, but rather serves to establish it, that 'in grants of land with uncertain designations, to be made on a large district of country, they must have been severed from the public domain by survey, or be void for want of identity. Upon mature deliberation, the same doctrine was held in Buyck's case, 15 Peters, 215, which was a grant for lands at "Mosquito," south and north of said place.' Also, in O'Hara's case, 15 Peters, 275; again in Delespine's case, 15 Peters, 319. Indeed the settled doctrine of these courts, in respect to these Florida grants, is, that grants for lands, embracing a wide extent of country, or within a large area of natural or artificial boundaries, and which granted lands were not surveyed before the 24th of January, 1818, and which are without such designations as will give a place of beginning for a survey, are not lands withdrawn from the mass of vacant lands ceded to the United States in the Floridas, and are void, as well on that account, as for being so uncertain, that locality cannot be given to them."

the cession, nor by the United States government since, as conferring a title to any specific parcel of land.¹ Such claims, therefore, have not been regarded as coming within the 8th article of the treaty, which, although it did not require actual possession to give title, required such identity to be established as would enable the courts to ascertain with reasonable certainty where the land lies. This might be shown either from the face of the grant, or by a legal survey made by the surveyor-general in conformity to the grant during the time he had power to make such surveys.²

§ 327. On the other hand, there have been cases where slight and immaterial deviations have been overlooked in surveys, provided the original concession was sufficiently definite to show that the number of acres stated had been severed from the public domain in a particular place, and the survey identified the place with reasonable certainty.³

§ 328. Grants have also been made with authority to take an equivalent in another place, if the lands could not be located at the place mentioned in the petition. Thus, in Sibbald's case, a mill grant of five miles square was petitioned for on Trout Creek, or its equivalent, in the event that this situation would not permit sixteen thousand acres, the quantity asked for, to be surveyed in this form, and the grant was made accordingly, with an equivalent of the deficiency, not at a particular place, but generally. Ten thousand acres were surveyed at Trout Creek, and it was proved that no more could be had there without interfering with elder claims. The court adjudged that the equivalent referred to quantity, rather than to form of survey, and

¹ Wiggins' case, 14 Peters, 334, 351.

² The United States *v.* Lawton, 5 Howard, 10, 28, 29; Hanson's case, 16 Peters, 196.

³ The United States *v.* Antonio Huertas, 8 Peters, 475; Same *v.* John Huertas, *Ibid.* 488; Same *v.* Breward, 16 Peters, 143, 147.

that the six thousand acres deficient could be surveyed on any vacant lands in the province and in several surveys.¹ So, too, where the party solicited a grant of fifteen thousand acres at two places named, and the lands were granted to him in property, with directions to the surveyor-general to run them in the places mentioned, "or in others that are vacant and of equal convenience to the party," and four surveys were made in four different places, amounting in all to fifteen thousand acres, but none of them at either of the places mentioned in the petition; the court held that, as to the equivalent, the party was not restricted to any particular spot, nor to any form or number of surveys, and, therefore, might elect any vacant lands, and at different places.²

§ 329. Where the grant designated a natural object, as the place of commencement of the survey, which, according to the rules of conforming a survey to the location practised in the United States, would form a boundary, but the object of the grant appeared to be to give timbered land, the nearest vacant timbered land to that natural object was held to have been within the intention of the government of Florida and of the grantee.³

¹ The United States *v.* Sibbald, 10 Peters, 313.

² The United States *v.* The Heirs of Clarke & Atkinson, 16 Peters, 228.

³ The United States *v.* Low, 16 Peters, 162, 166. In this case, the court said: "The land could be only surveyed at the place granted; if elsewhere, it would have been a new appropriation, where the survey bears date in 1819, contrary to the eighth article of the treaty with Spain; and the question is, Was it at the proper place? It was granted 'on the northwest side of the head of the Indian River or lagoon.' According to the strict ideas of conforming a survey to a location in the United States, the survey would be located adjoining the natural object called for, there being no other to aid and control the general call; and, therefore, the head of the lagoon would necessarily have formed one boundary. But it is obvious more latitude was allowed in the province of Florida. The object of the grant was timbered land, fit for the supply of lumber, and if the nearest vacant timbered land to the head of the lagoon was surveyed, the intentions of the government and of the

§ 330. The Act of the 26th May, 1830, which provided for the final settlement of these claims, contained the same limitation of time within which the claims were to be presented, as that provided by the Act of 23d May, 1828, namely, one year from its date.¹

§ 331. We now come to the examination of the cases which have arisen under the treaty of cession of Louisiana, and the Acts of Congress in relation thereto.

The province of Louisiana was ceded by the French Republic to the United States, by the treaty of April 30th, 1803. The *second* article of the treaty was in part as follows: "In the cession made by the preceding article are included the adjacent islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private property." The 3d article of the treaty provided, that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and, in the meantime, they shall be maintained and protected in the free enjoyment of their liberty, *property*, and the religion which they profess."²

§ 332. On the 26th of May, 1824, Congress passed "An Act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas, to institute

grantee were complied with. This was the construction given by the surveyor-general to the words 'northwest side.' He permitted the general call to vary so far and no farther as to secure timbered land, excluding the prairies next the head of the lagoon. The legality of the survey depends on the fact."

¹ The United States v. Marvin, 3 Howard, 620.

² 8 Statutes at Large, 200, 202.

proceedings to try the validity of their claims."¹ By a subsequent statute, passed May 24, 1828, the Act of 1824 was continued in force for a further period, and amended.² By a still more recent statute, passed June 17, 1844, so much of the expired Act of 1824 as related to the State of Missouri (excluding all such portions of it as referred to the *territory* of Arkansas), was revived and re-enacted and continued in force for the term of five years; and the provisions of that part of the act, thus revived and re-enacted, were extended to the States of Louisiana and Arkansas, and to so much of the States of Mississippi and Alabama as is included in the district of country south of the thirty-first degree of north latitude, and between the Mississippi and Perdido Rivers, in the same way, and with the same rights, powers, and jurisdictions to every extent they can be rendered applicable, as if these States had been enumerated in the act revived, and the enactments expressly applied to them as to the State of Missouri; and the district court, and the judges thereof in each of these states, were directed to exercise the like jurisdiction over the land claims in their respective states and districts, originating with either the Spanish, French, or British authorities, as by the act revived was given to the court and judge in the State of Missouri.³

§ 333. The Supreme Court of the United States have explained the operation of the reviving Act of 1844, in two cases. In one of them, the district court had decreed that "in case any of the lands claimed by the petitioner should have been sold by the United States, he, the petitioner, should be authorized to enter, in any land-office in the State of Louisiana, a like quantity of public lands." Upon this decree, the Supreme Court observed: "By the Act of 1824, it is provided, that if it shall so happen that the lands decreed to any complainant 'shall have been sold by the United States, or otherwise disposed of, it shall be lawful

¹ See Appendix.

² See Appendix.

³ 5 Stat. at Large, 676.

for the party interested to enter the like quantity on other lands.' Here the decree is general against the United States, and awards to complainant floating warrants for all lands that the United States may have sold, or otherwise disposed of within the bounds of the tract decreed. The act requires the names of all persons claiming the land sued for, or any part of it, to be set forth in the petition, and that they shall be made defendants in due form by citation; and if the entire tract is claimed by private persons, then they shall be the defendants; but if the government is owner in part, or of the whole, then this fact shall be stated, and the attorney of the district must be served with process, and be allowed to answer for the United States. The purpose of Congress was first to authorize a suit against the United States, and in the next place to give judicial cognizance of a description of incipient claims having no standing in a court of justice before the act was passed; and, thirdly, that the petitioner should be bound to sue private persons claiming the same land, so that those having an interest, and better knowledge of facts, and more capacity to defend than the United States, might be drawn into the contest; and that they should be compelled to produce their title, so that if a decree was made for complainant, the court could ascertain what part of the land should be granted to him by patent, and as this could only be done by a specific ascertainment of interfering claims, the decree of necessity must specify their boundaries and quantities. Nor can it stop here; it must adjudge that a warrant shall issue and be subject to location. This decree is not only in general terms, but it is contingent, that in case all the lands claimed, or any part or portion of them have been sold or otherwise disposed of by the United States, then the petitioner shall be authorized to enter a like quantity, &c. The district court, as we apprehend, did not proceed to adjudge other lands as an equivalent on the Act of 1824, as it originally stood, but, on amendatory and repealing clauses, found in the 8th section of the Act of May 23d, 1828, extending the

law to Florida, and especially to the 2d section of the Act of 24th May, 1828, giving further time to claimants in Missouri and Arkansas to institute suits, both of which clauses declare that so much of the Act of 1824 as requires petitioners to make adverse claimants parties to the suit shall be and are thereby repealed. The Act of 24th May, 1828, contains various other provisions, some of which modify and others repeal parts of the Act of 1824.

“The Act of June 17, 1844, provides that so much of the Act of May 26, 1824, as relates to the State of Missouri, is thereby revived and re-enacted; and the same jurisdiction is given to the district courts of Arkansas, Louisiana, Alabama, and Mississippi, as was exercised under said Act of Missouri, with the exception of that part of the act (being sections 14 and 15) that applied exclusively to the Territory of Arkansas, which only allowed claims of a league square and under to be adjudicated. The thirteen previous sections stand incorporated in like manner as they would be if they had been copied into the Act of 1844. No language to this effect could make it plainer; any attempt to incorporate, likewise, the Act of 24th May, 1828, into that of 1844, would not only be a forced construction, but a manifest perversion. It follows that the law, as found in the thirteen first sections of the Act of 1824, furnishes all authority the district court had to proceed and to decree an equivalent; and that the true mode of proceeding, according to the law as it stands, is, as above stated, we suppose, to be not open to controversy.”¹

§ 334. The other case relates to the limitations of time within which petitions could be filed. “The Act of June 17th, 1844, under which the petition was filed, extended to Louisiana the Act of 1824, and revived such parts of it as had expired. Under this provision, the fifth section of the Act of 1824 was revived, and became a part of the law of

¹ The United States v. Moore, 12 Howard, 209, 223.

1844. And by this section the time for filing a petition by a claimant, under a French or Spanish grant, is in express terms limited to two years from the passage of the law. The time limited, therefore, for filing a petition in Louisiana expired on the 17th of June, 1846, and this petition was not filed until March the 8th, 1848, long after the time fixed by the law. . 8 How. 119. The Acts of 1826 and 1828, referred to in the argument, can have no bearing on the question. They are not mentioned, nor in any manner referred to, by the Act of 1844. They were special laws enlarging the time given by the Act of 1824 to claimants in Missouri and Arkansas to file their petitions. But they are not extended to Louisiana by the Act of 1844. Nothing but the Act of 1824 is extended. As to the supposed waiver by the district attorney of his objection as to the time of filing the petition, by answering after his plea was overruled, it must be made, we suppose, upon a mistake as to the fact. For in his answer he insists upon the same defence. And he had a right to avail himself of it by way of answer, as well as by plea. But if he had, in express terms, waived it, and entered his waiver on the record, it would not have given jurisdiction to the court, where the Act of Congress had not conferred it. The objection to the regularity with which the appeal was brought up must also, we presume, have arisen from some oversight in the counsel. The record shows that it has been brought up regularly, according to the provisions of the Act of Congress. The objection that an appeal will not lie on behalf of the United States, when the claim is less than one thousand acres, is too clearly untenable to require discussion.”¹

§ 335. The Act of May 26, 1824, thus revived and extended, gave the District Court authority to hear and determine all questions arising in any cause brought before it by the petition of any person claiming lands within the State of Missouri, “by virtue of any French or Spanish

¹ The United States *v.* Porche, 12 Howard, 426, 432.

grant, concession, warrant, or order of survey legally made, granted, or issued, before the 10th day of March, 1804, by the proper authorities, to any person or persons resident in the province of Louisiana at the date thereof, or on or before the 10th day of March, 1804, and which was protected or secured by the treaty between the United States and the French Republic, of the 30th day of April, 1803, and which might have been perfected into a complete title, under and in conformity to the laws, usages, and customs of the government under which the same originated, had not the sovereignty been transferred to the United States."

§ 336. It has been held, with regard to the treaty here referred to, as it has been with regard to the Florida treaty,¹ that the stipulation of the third article by which, until incorporated into the Union, the inhabitants of the ceded territory were to be protected in the enjoyment of their property, was the assertion of a principle that would be held sacred without treaty or stipulation. But the contracting parties thought it fit that the right of private property should be protected and secured by the treaty, and it is fully settled that an inchoate title to lands is property.² The Act of Congress refers, therefore, to those titles to land which are among the rights of property secured by the treaty.³ The government of the United States having put itself in the place of the former sovereigns of the country, and become invested with all their rights, subject to their concomitant obligations to the inhabitants, the question to be determined is, whether a right had so attached to any tract of land, as to affect the conscience of the former sovereign with a trust, and make him a trustee for the individual holding the land, claimed by an equity upon it, amounting to a severance of so much from the public domain, before and at the time the country was ceded to the

¹ Ante.

² *Delassus v. The United States*, 9 Peters, 117; *Soulard v. The Same*, 4 Peters, 511.

³ *Ibid.*

United States.¹ The Acts of 1824 and 1844 were passed, to enable persons who had only an inchoate and equitable title to obtain an absolute and legal one, by proceeding in the district court in the manner prescribed. When the title under which the party claims would be a complete and absolute one, if granted by competent authority, or established by proof, the district courts have no jurisdiction under these Acts of Congress to decide upon its validity.² Their jurisdiction, under these acts, extends to incomplete titles only, derived either from Spanish, French, or British grants, and of these the Act of 1824 provided for such only as had been legally issued by competent authority, and were protected by treaty.³ The act was not designed to invest the

¹ *Strother v. Lucas*, 12 Peters, 410 ; *The United States v. Boisdore*, 11 Howard, 63, 88.

² *The United States v. Pillierin*, 13 Howard, 9 ; *Same v. McCullagh*, 13 Howard, 216.

³ In the *United States v. Castant*, 12 Howard, 437, 440, the Supreme Court thus explained the grounds of jurisdiction under the Acts of 1824 and 1844: "This decision of the district judge is palpably inconsistent with the repeated adjudication of this court, upon the language and object of the Act of Congress of 1824, and of the reviving Act of 1844, and is indeed contradictory and inconsistent with itself, in the different grounds it assumes for its support. Before proceeding to a more particular examination of the decision of the district court, it seems proper to advert to the true position of the petitioner, or rather of the grantee, from whom his title is deduced, as described in the petition, and to inquire whether that position, as there described, apart from the question of the completeness or incompleteness of the grant, be one on which the jurisdiction of the district court could attach. Thus, it must be remembered, that in the enumeration in the Act of 1824, of the qualifications requisite for claiming the benefit of that act, is the residence of the grantee within the province of Louisiana, at the date of the grant, or on or before the 10th day of March, 1804. This requisite of residence, at one of the periods prescribed, can in no wise be received as a matter of form. It is of the essence of the right to invoke the aid of the Act of Congress which was designed to confer a benefit on actual occupants or settlers, such being its character ; it should, therefore, in every instance in which that act is appealed to, be both averred and

holders of imperfect titles with new or additional rights, but merely to provide a remedy by which legal and *bona fide* proved. In the case before us, the petition is wholly silent as to this qualification, and no proof is adduced as to its existence.

“For this omission alone, then, to aver a material, nay, the most material ingredient in the right to invoke the aid of the Act of 1824, the petition presented no case upon which the jurisdiction of the district court could attach. This case has been ruled in the cases of the United States *v.* Reynes, in 9th Howard, 127, and of the United States *v.* D'Auterieve, in 10th Howard, 609, and in other cases decided during the present term of this court. But let us view this case in other aspects of it, as exhibited upon the face of the petition and documents adduced to sustain it, and, as it is characterized in the decree of the district court, in order to determine whether it be one within either the mischiefs or the remedies described or provided by the Act of Congress of May 26th, 1824. By recurrence to the certificate of Trudeau, and to the figurative plan accompanying it, dated November 15th, 1798, the quantity of the land and the boundaries thereof will be seen to have been fixed and described with the utmost precision, so as to leave no room for mistake or uncertainty. Turning next to the grant or concession by Gayoso, on the 12th of December, 1798, it will be seen that the certificate of survey by Trudeau, and the figurative plan, are directly referred to, and all the lines and boundaries, the quantity of land, and indeed every indicium by which it had been described, are adopted by the grantor in the very language of the certificate, and after such reference and adoption, the grant concludes in the following terms: ‘Approving, then, as we do hereby approve them, availing ourselves of the faculty which the king has given, as we grant in his royal name to the aforesaid Donna Maria Manetta Lavrau Trudeau, the aforesaid five hundred superficial acres of land, that she may use and dispose of them as her own property, in conformity with the aforesaid acts.’ The effect of these proceedings, on the part of the Spanish governor, was to vest in the grantee a perfect legal estate in the subject granted the *titulo in forma*.

“The district court, upon the strength of these proceedings, declares what was unquestionably true, viz., that the title vested in the grantee by the Spanish authorities was a perfect one. But the court goes on to deduce from this truth a consequence which it did not warrant, but which it entirely excluded, viz., that ‘therefore the plaintiffs are entitled to the relief granted by the Act of Congress, entitled,’ &c. The legitimate deduction from the facts above ascertained and admitted by the court, would have been to this effect, and, therefore, the district court could have no jurisdiction of the plaintiff’s petition, and that the same

claims might be established. And, therefore, where a grant was made by the Spanish Governor of Louisiana, on the 2d

be accordingly dismissed. It is in this respect that the inconsistency of the decree of the district court, with the facts on which it professes to be founded, and with the acts of 1824 and 1844, and with itself, is made manifest. It first asserts the completeness of the title of the petitioner, and then declares it to be dependent on aids provided by statute, provided for the purpose of perfecting titles avowedly incomplete, which must continue for ever incomplete, except for the means so provided for perfecting them. That interpretation of the Acts of Congress of 1824 and 1844, which declares them to be inapplicable to perfect legal titles, can no longer be questioned. It has been expressly ruled in the cases already cited of the *United States v. Reynes*, in 9th Howard, 127, and in the *United States v. D'Auterieve*, in 10th Howard, 609; and upon the same interpretation of the statutes above mentioned, have numerous cases been decided during the present term.

"The decree of the district court in this case is marked by other peculiarities which must deprive it of any validity whatsoever. The decree first decides that the title of Donna Maria to the land in question is good and complete as against the United States, and that, therefore, the land belongs to the petitioners as deducing title from her. The decree then proceeds to declare and order 'that whereas it is ascertained that a great part of the said land is now held by titles emanating from the United States, it is further ordered, adjudged, and decreed, that for all the land within the limits so held, which has been sold or otherwise disposed of by the United States, the petitioners shall be and they are hereby authorized to enter in any land-office of the United States in the State of Louisiana, a like quantity of public land elsewhere, in conformity with the provisions of the 11th section of the Act of Congress, approved on the 26th May, 1824. Now it is to be observed, in the first place, that there is in this case, on the part of the United States, a general denial of every fact contained in the petition; nothing is admitted directly or by implication. In the next place, there is not in this record to be found even an attempt to show a grant or confirmation of any portion of this land by the United States to any person whomsoever, nor the possession of it, nor of any portion of it, by any person at any time, not even by the petitioners, or those from whom their title is deduced. Indeed, none but the government of the United States is made a party defendant in this case. Upon what proof, or on what surmise even, the district court could conclude that the lands had been granted or confirmed by the United States, this court cannot conjecture. Even if the opinion of the court could import intrinsically any proof upon this point, the inquiries would remain, as to what portion of the

of January, 1804, for lands included within the limits of Louisiana, the question was, whether the title was based upon an authority competent to its creation. Spain had parted with her title to Louisiana to France, by the treaty of St. Ildefonso, on the 1st of October, 1800, and France had ceded the province to the United States by the treaty of Paris, of the 30th September, 1803. The circumstance that the Spanish authorities retained possession of portions of Louisiana until the year 1810, did not authorize the issuing of grants for land by those authorities, upon the ground that they constituted a government *de facto*, inasmuch as Spain had parted with her right of sovereignty, and her subsequent possession was always treated by the United States as wrongful, after October, 1800. When, therefore, the treaty of Paris stipulated for the protection of the people of Louisiana in the free enjoyment of their liberty and property, the case of a grant made by the Spanish authorities, while holding a wrongful possession of the country, was not within its meaning, which embraced only possessions or rights founded in justice and good faith, and based upon authority competent to their creation.¹

lands had been granted, by whom and to whom. Without information upon those heads, it seems difficult to imagine if the fact of grants having been made were to be conceded, what should be the extent of the equivalent to be substituted for them? The mere assertion of the one or the other can invest no right, and impose no duty. It is too vague and indefinite to be comprehended, much less to be enforced with due regard to the rights of the parties to the cause."

¹ *The United States v. Reynes*, 9 Howard, 127, 143. The opinion of the court in this case, delivered by Mr. Justice Daniel, illustrates so fully the operation of the treaty and of the Acts of 1824 and 1844 that I extract it entire. "The petitioner in the court below, as the heir of Jose Reynes, claimed under a grant from the government of Spain, forty thousand arpents of land, lying within what was formerly the district of Baton Rouge, now making portions of the parishes of East Feliciana and St. Helena, in the State of Louisiana. The documents upon which this claim is asserted, so far as the formalities entering into the creation of a complete title under the Spanish government are requisite, appear to be regular, and to have been admitted in evidence without exception. No

§ 336, a. So, also, where the representative of the king of France in Louisiana made a grant of land in 1765, the province

exception has been taken either to the verity of the signatures and certificates appended to these documents, or to the truth of the official position of the agents by whom those signatures and certificates have been made. The questions arising upon this record grow out of considerations beyond the mere facts admitted as above mentioned; considerations involving the powers of agents, whose acts are relied on, as affected by the treaties, by the political sovereignty, and by the legislation of the United States. The petition in this case, if not by its own terms, has by the arguments adduced in its support, been rested upon the Act of Congress of May 26, 1824 (re-enacted by the Act of June 17, 1844), and extended in its operations to claims originating with either the Spanish, French, or British authorities, by which act, it seems to be supposed, that beyond the mere permission therein given to proceed against the United States as defendants in their own courts, some essential rights in the subject of pursuit have been originated or superinduced on behalf of claimants; rights which, but for the law of 1824, could not have existed. The character of this hypothesis requires particular examination, as upon its correctness or its fallacy must depend the fate of this claim, and of every other similarly situated. Pursuing this theory, it is insisted that the petitioner (the defendant in error here), as the heir of a purchaser for valuable consideration from the Spanish authorities, and holding the evidences of a perfect title from those authorities, is now permitted to show that he falls within the class of persons whose rights have been protected, both by the treaty of St. Ildefonso, between Spain and France, of the 1st of October, 1800, and by the treaty of Paris, between France and the United States, of the 30th of April, 1803, and who are specially referred to and provided for in the Act of 1824.

"In answer to this pretension of right, under the Act of 1824, it might perhaps be sufficient to observe, that if this right be asserted in virtue of a perfect Spanish title, it would seem to be comprised neither within the mischief nor the remedy contemplated by the statute. The mischief intended to be provided for by the Act of 1824, was the inchoate or incomplete condition of titles having a fair and just and legal inception under either the French or Spanish governments of Louisiana, but which, by reason of the abdication or superseding of those governments, and by that cause only, had not been completed. The remedy was the permission to bring such titles before the courts of the United States, and there to render them complete, and to establish them by proof of the legality and justice of their origin and character.

"Such, then, being the mischief declared, and such the remedy provided by the statute, it is difficult to perceive the reason or the authority

having been ceded by the king of France to the king of Spain in 1762, and not re-ceded to France until the treaty of

for bringing before the courts, merely for supervision, titles alleged to be already perfected under the unquestionable and competent authority of either Spain or France. With regard to titles so derived and so consummated there is no provision made by statute. None could be requisite : and there could, with reference to such titles, be nothing for the courts to act upon ; nothing which it was competent to them to consider. Conceding for the present that the title before us has not been completed, the inquiry presents itself, whether, in other respects, it corresponds with the description of claims authorized by the law to be brought before the courts for completion and establishment. Amongst the requisites demanded for those titles by the statute, are the following : that they shall be legally granted by the proper authorities to persons resident within the province of Louisiana at the time, or on or before the 10th day of March, 1804 ; that they should be such claims as were protected or secured by the treaty between the United States and the French Republic, of the 30th April, 1803, and which might have been perfected into complete titles under and in conformity to the laws, usages, and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the United States. With regard to the modes of proceeding by which these claims are to be brought before the courts, the statute next prescribes that it shall be by petition, setting forth fully and plainly the nature of the claim to the lands, &c., particularly stating the date of the grant, concession, warrant, or order of survey under which the claim is made, by whom issued, &c. By the second section of the statute, it is enacted that every petition which shall be prosecuted under its provisions, 'shall be conducted according to the rules of a court of equity, except that the answer of the District Attorney of the United States shall not be required to be verified by his oath, and the said court shall have full power and authority to hear and determine all questions arising in said cause, relative to the title of the claimant, the extent, locality, and boundaries of the claim, or other matters connected therewith, fit and proper to be heard and determined, and by a final decree to settle and determine the question of the validity of the title according to the law of nations, the stipulations of any treaty, and proceedings under the same, the several Acts of Congress in relation thereto, and the laws and ordinances of the governments from which it is alleged to have been derived.' In part compliance with the Act of Congress, the petitioner alleges that his father acquired the land claimed (now situated within the parishes of East Feliciana and St. Helena, in the State of Louisiana), by purchase and grant from Juan Ventura Morales, the duly authorized officer and agent of the Spanish

St. Ildefonso (Oct. 1st, 1800), it was held that the grant was void.¹ So, too, where the Spanish governor of Louisi-

government, the then sovereignty over the territory in which the said land is situated, at the time of the purchase and grant; and that Morales had full authority from the government of Spain to sell the said land, and to grant a good and perfect title thereto.

"The petitioner goes on to allege a survey made and returned by the duly authorized officer of the Spanish government, on the 19th day of November, 1803; payment of the purchase-money on the 30th of December, 1803, and the emanation or issuing of the grant to the father of the petitioner on the 2d of January, 1804. In support of the petition there are made exhibits, the certificates of the deputy and principal surveyors, Petando and Trudeau, and the grant from Morales to the father of the petitioner for the land in question; these documents respectively correspond in dates with the allegations of the petition. Upon the foregoing allegations and documents, it is insisted for the defendant in error, that by operation of the Acts of 1824 and 1844 already cited, and by virtue of stipulations in the treaties of St. Ildefonso and of Paris, and by the rules of the law of nations, as applicable to those treaties, his rights to the land granted by Morales to his father have been protected, and that the petitioner is entitled thereto as adjudged to him by the district court. With respect to that interpretation of the Acts of Congress which would expound them as conferring on applicants new rights not previously existing, we would remark that such an interpretation accords neither with the language nor the obvious spirit of those laws; for if we look to the language of the Act of 1824, we find that the grants, surveys, &c., which are authorized to be brought before the courts, are those only which had been legally made, granted, or issued, and which were also protected by treaty. The legal integrity of those claims (involving necessarily the competency of the authority which conferred them) was a qualification associated by the law with that of their being protected by treaty. And as to the spirit and intention of the law, had it designed to create new rights, or to enlarge others previously existing, the natural and obvious means of so doing would have been a direct declaration to that effect; certainly not a provision placing these alleged rights in an adversary position to the government to be vindicated by mere dint of evidence not to be resisted. The provision of the second section of the Act of 1824, declaring 'that petitions presented under the act shall be conducted according to the rules of a court of equity,' should be understood rather as excluding the technicalities of proceedings in courts, than as in any degree varying the rights of parties litigant; as designed

¹ The United States v. D'Auterieve, 10 Howard, 609.

ma, at the time when he made a grant of two islands lying off the coast of Mississippi, was only the military comman-

to prevent delays in adjudicating upon titles, as is further shown in another part of the same sentence, where it is declared that these petitions shall be tried without continuance, unless for cause shown. The limitations, too, maintained as to the character of claims, and that imposed upon the courts in adjudicating upon them, is further evinced in that part of the same section, which says, that the court shall hear and determine all the questions relative to the title of the claimants, the extent, locality, and boundaries of the claim, and by final decree shall settle and determine the questions of the validity of the title, according to the law of nations, the stipulations of any treaty, and proceedings under the same, the several Acts of Congress, and the laws and ordinances of the government from which it is alleged to have been derived. In some aspects of their claims, they were properly to be denominated equitable. They were to be equitable in the sense that they should not be inequitable or wrongful; that they should be rightful and founded in justice; and they were necessarily to be equitable in so far as they were incomplete, and could not, therefore, be maintained as perfect titles. But, in no proper acceptation could they be called equitable titles as implying any addition to their strength, or any diminution of the rights of the United States as affected by the statute. We come now to the inquiry, whether the grant in question was protected either by the treaty of retrocession from Spain to the French Republic, or by the treaty of Paris, by which the territory of Louisiana was ceded to the United States. The treaties above-mentioned, the public acts and proclamations of the Spanish and French governments, and those of their publicly recognised agents, in carrying into effect those treaties, though not made exhibits in this cause, are historical and notorious facts, of which the court can take regular judicial notice, and reference to which is implied in the investigation before us. It is proper in this place again to refer to the date of the certificate of survey, on which the grant in question was issued, and to the grant itself. The former purports to have been given on the 19th day of November, 1803, the latter to have been issued by Morales on the 2d of January, 1804. The dates of the treaties of St. Ildefonso and Paris have already been mentioned; that of the former being the 1st of October, 1800, that of the latter the 30th of April, 1803. In the construction of treaties, the same rules which govern other compacts properly apply. They must be considered as binding from the period of their execution. Their operation must be understood to take effect from that period, unless it shall, by some condition or stipulation in the compact itself, be postponed. Were it allowable at this day to construe the treaty of St. Ildefonso as not being operative from the signature

dant of the region in which the lands were situated, holding the country by right of conquest, the Spanish law not

thereof, its operation could by no construction be postponed to a period later than the 21st of March, 1801, at which time, by the treaty negotiated by Lucien Bonaparte and the Prince of Peace, Spain accepted from the French Republic the Grand Duchy of Tuscany, in full satisfaction of the provision stipulated in favor of the Duke of Parma; or at the farthest, the government of Spain must be concluded, as to satisfaction of the stipulation above-mentioned, by the royal order issued at Barcelona, on the 15th of October, 1802, announcing from the King to his subjects the retrocession of Louisiana, and giving orders for the evacuation of the country by all Spanish authorities, and its delivery to General Victor, or any other officer authorized by the French Republic to take possession. In obedience to this order, formal possession was, on the 30th of November, 1803, delivered by Saleedo and Casa Calva, the Spanish commissioners, to Lausatt, the prefect and commissioner of the French Republic.

“The treaty between the United States and the Republic of France contains no article or condition by which its operation could be suspended. It declares that the Republic, in pursuance particularly of the third article of the treaty of St. Ildefonso, has an incontestable title to the domain and to the possession of the territory, and cedes it to the United States, in the name of the French Republic, for ever, and in full sovereignty with all its rights and appurtenances. This treaty, therefore, operated from its date. Its subsequent ratification by the American government, and the formal transfer of the country to the American commissioners, on the 20th of December, 1803, have relation to the date of the instrument. The rights and powers of sovereignty, on the part of Spain, over the territory, ceased with her transfer of that sovereignty to another government. It could not exist in different governments or nations at the same time. The power to preserve the peace and order of the community may be admitted to have been in the officers previously appointed by Spain, until the actual presence of the agents of the succeeding governments. But this would not imply sovereign power still remaining in Spain; for if she continued to be sovereign after expressly conceding her sovereignty to another government, she might still rightfully resist and control that government: for sovereignty, from its nature, is never subordinate. She might, if still sovereign, notwithstanding her treaty stipulations with France, have ceded the entire territory to some other nation. That the government of Spain never supposed that any sovereign authority was retained by it after the cession to France, is apparent from the character of the treaty itself, and of the acts of the Spanish government carrying that

having been introduced, and the country not having been ceded by Spain to Great Britain until two years afterwards,

treaty into effect. It is a somewhat curious fact, that there is not in this treaty a single stipulation or guarantee in favor of the lives and property of the subjects or inhabitants of the ceded country, much less a reservation of power to grant or invest new rights within that territory. The same characteristic is observable in the royal order announcing the cession, and also in the formal act of delivery of the territory. So far from containing any such stipulation or reservation, the language of his Catholic Majesty may correctly be understood as conveying an acknowledgment that he had made no condition or stipulation whatever in behalf of his late subjects, and had no power to insist on anything of the kind; but had handed them over to the justice, or the liberality of the new government, to whom he had transferred them.

“Thus in the order of Barcelona, after announcing the cession of the territory, and directing the collection of all the papers and documents relating to the royal treasury, and to the administration of the colony of Louisiana, in order to bring them to Spain for the purpose of settling the accounts; and an inventory of all artillery, arms, and ammunition, effects, &c., which belong to him, and an appraisement of them, in order that their value might be reimbursed him by the French Republic, he uses this language: ‘Meanwhile, we hope for the tranquillity of the inhabitants of said colony, and we promise ourselves, from the sincere amity and close alliance which unite us to the government of the Republic, that the said government will issue orders to the governor and other officers employed in its service, that the ecclesiastics and religious houses, employed in the service of the parishes and missions, may continue in the exercise of their functions, and in the enjoyment of their privileges and exemptions granted to them by the charters of their establishments. That the ordinary judges may, together with the established tribunals, continue to administer justice according to the laws and customs in force in the colony. That the inhabitants may be protected in the peaceful possession of their property. That all grants of property, of whatever denomination, made by my governors, may be confirmed, although not confirmed by myself. I hope, further, that the government of the Republic will give to its new subjects the same proof of affection and protection which they have experienced under my dominion.’

“This order from the king is an explicit admission of what the treaty itself exposes, namely, that no special stipulation had been made for the protection either of persons or property; that he regarded his own authority and the dominion of Spain over the territory as at an end;

it was held that the governor had no authority to grant.¹ So, too, where the court found that the officer of the Spanish

and that his sole reliance for the protection and welfare of his late subjects, and even for enforcing the grants he himself, through his officials, had made, was on the justice and benevolence of the new government. So far as the acts of the King of Spain are to be considered, in connexion with the territory, and its inhabitants ceded by him, he appears to have committed both to those practices, and to that discretion, which obtain in civilized communities, wholly uninfluenced by any pledge or condition exacted by himself. The proclamation of the Spanish provincial officers is almost a literal repetition of this royal order. The treaty of St. Ildefonso, then, can, by no rule or principle deducible from the laws of nations, be interpreted as still reserving to Spain, after the signature of that treaty, the power to grant away the public domain; for she could have had no right to calculate upon the mala fides of the French Republic, with regard to the provision for the Duke of Parma, and to make such calculation an excuse for mala fides on her own part. But surely no right, under any pretext, to grant the public domain, could exist in Spain after the treaty of Aranjuez, of March 21st, 1801, between that country and France, by which the Grand Duchy of Tuscany, that had been previously ceded to the French Republic, was accepted by Spain in full satisfaction of the provisions agreed to be made for the Duke of Parma. And least of all could such a power continue in the government of Spain after the royal order of the 15th of October, 1802, proclaiming the retrocession of the territory of Louisiana, and the fulfilment or satisfaction, of course, of all treaty stipulations in reference to that territory, and all this, too, promulgated under the signature of the king himself. It may now be properly asked, What, then, are the grants, titles, or other rights protected by the third article of the treaty between the United States and the French Republic, of the 30th of April, 1803, and by the Acts of Congress of 1824 and 1844, referring to that treaty, and to previous acts of the Spanish government? The third article of the treaty of Paris, of 1803, is in these words: 'The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.' The term property, in this article, will embrace rights either in possession or in action: property to which the

¹ The United States *v.* Power's Heirs, 11 Howard, 570.

government, whose grant was relied upon, had not the power to dispose of the public domain, at the time of the grant, it

title was completed, or that to which the title was not yet completed, but in either acceptance it could be applied only to rights founded in justice and good faith, and based upon authority competent to their creation. The article above cited cannot, without the grossest perversion, be made either to express or imply more than this. According to this just and obvious rule of interpretation, the treaty of Paris, of April the 30th, 1803, by any reference it could be supposed to have to titles or claims derived from Spain, could embrace such only as had their origin whilst Spain was the rightful sovereign over the territory, a period which, by the most liberal extension of her power, cannot be carried farther than the 13th of October, 1802, the date of the royal order of Barcelona. Indeed, if not from the date of the treaty of St. Ildefonso, yet certainly from the 21st of March, 1801, grants by Spain, of the public domain of Louisiana, would have been frauds upon the French Republic, since, by the treaty of Aranjuez, of the date last mentioned, full satisfaction of the terms stipulated for the Duke of Parma was acknowledged by Spain. Looking more particularly to the documents on which this claim is founded, we find it recited by the certificate of Pitando, that the land in question had been surveyed by him, in obedience to a decree of the General Intendancy of the province, under the date of the 1st September, 1803. This decree is not produced in evidence, but upon the supposition that it was on the record and properly verified, the question of the competency of the authority to order it would stand precisely as it does in its absence. Turning next to the grant itself, there are, in addition to the fact of the date of that instrument, other circumstances disclosed upon its face, showing not only the want of authority in the grantee to make a good title, but which bring home to the grantee and to the individual soliciting the grant, full knowledge that the title to whatever might be properly considered Louisiana, at least, no longer remained in the Spanish government. The grant is dated at New Orleans. It recites the application of Reynes for 40,000 arpents of land, to be paid for in letters of credit formerly issued by the provincial government, and then goes on to state that, in consequence of the petition, Morales had caused a certified copy of the letter addressed by that Intendancy to the commissioners appointed for the transfer of the province of Louisiana, to be submitted, with the petition, to the solicitor of the crown. This document, then, excludes all doubt as to the knowledge of the parties of the cession to the United States of Louisiana, by whatever might have been its real boundaries. It is signed by Morales, not as being an officer of the territory of Louisiana, but as Intendant of the province of West Florida, after Louisiana had passed to two sovereign states since its

was held that a receipt of that date, given by him for the purchase-money of the lands, could convey no title.¹ In

possession by Spain, and after actual possession had been delivered to the United States. It is clear, then, that the documents exhibited and relied on by the appellee could, by their own terms, convey no title within the territory of Louisiana. Superinduced upon our own conclusions, drawn from the treaties above mentioned, and from the laws of nations applicable to their construction, is the positive legislative declaration, in the Act of Congress of March 26th, 1804, 'pronouncing all grants for lands, within the territories ceded by the French Republic to the United States, by the treaty of the 30th of April, 1803, the title whereof was, at the date of the treaty of St. Ildefonso, in the crown government, or nation of Spain, and every act and proceeding subsequent thereto, of whatsoever nature towards the obtaining of any grant, title, or claim to such lands, under whatsoever authority transacted or pretended, be, and the same are hereby declared to be, and to have been from the beginning, null and void, and of no effect in law or equity.'

This Act of 1804 explicitly avows the opinion of the government of the United States, as to any power or right in Spain at any time after the treaty of St. Ildefonso. It covers the whole subject of grants, concessions, titles, &c., derived from Spain at any time subsequent to the treaty, stamping upon all such grants, &c., the most utter reprobation, denying to them any validity or merit, either legal or equitable. This Act of 1804 has never been directly repealed. It still operates upon all the grants, concessions, &c., embraced within its provisions, so far as those provisions may be shown to have been modified by posterior legislation; and it has been invariably held, and, indeed, must follow, as of necessity, that imperfect titles, derived from a foreign government, can only be perfected by the legislation of the United States. But it is argued by the appellee, that as the land in dispute did not lie within the territory of which France obtained from Spain actual occupancy, or of which the United States ever obtained a like occupancy, until possession thereof was taken under the proclamation of President Madison, of October the 10th, 1810; and as the Spanish authorities in the mean time, as a government, *de facto*, retained possession, they could in this character invest their grantees with inchoate or equitable rights, which, under the privileges bestowed by the Acts of 1824 and 1844, might be matured into perfect titles as against the

¹ The United States v. Moore, 12 Howard, 209. See this case for an historical account as to what officer in Louisiana possessed the power to grant part of the king's domain.

like manner, where the French authorities of Louisiana had made a grant of land south of the thirty-first degree of

United States. Without stopping to remark on the caution which should ever be manifested in the admission of claims, which, if not founded in violence, or in mere might, yet refer us for their origin, certainly, not to regular, unquestioned, legal, or political authority, it may be safely said that claims founded upon the acts of a government, *de facto*, must be sustained, if at all, by the nature and character of such acts themselves, as proceeding from the exercise of the inherent and rightful powers of an independent government. They can never be supported upon the authority of such a government, if shown to have originated in a violation of its own compacts, and in derogation of rights it had expressly conceded to others. Every claim asserted upon wrong, such as this latter position implies, would be estopped and overthrown by alleging the compact or concession it sought to violate. Thus, if Spain, by the treaty of St. Ildefonso, did in truth cede to France the lands lying between the Mississippi and Perdido, she could not as a government, *de jure* or *de facto*, without the assent of the United States, possessing all the rights of the French Republic, make subsequent grants of the same lands either to communities or to individuals. Her grants could not be regarded as the inherent, competent, and uncommitted proceedings of an independent government *de facto*. They would be met and made null by her own previous acknowledgment. Whether by the treaties of St. Ildefonso and of Paris, the territory south of the thirty-first degree of north latitude, and lying between the Mississippi and Perdido, was ceded to the United States, is a question into which this court will not now inquire. The legislative and executive departments of the government have determined that the entire territory was so ceded. This court has solemnly and repeatedly declared, that this was a matter peculiarly belonging to the cognizance of those departments, and that the propriety of their determination it was not within the province of the judiciary to contravene or question. See the cases of *Foster and Elam v. Mutson*, 2 Peters, 253, and of *Garcia v. Lee*, 12 Peters, 511. In the former case, the court say: 'If a Spanish grantee had obtained possession of the land in dispute, so as to be the defendant, would a court of the United States maintain his title under a Spanish grant, made subsequent to the acquisition of Louisiana, simply on the principle that the Spanish construction of the treaty of St. Ildefonso was right, and the American construction wrong? Such a decision would subvert those principles which govern the relations between the legislative and judicial departments, and mark the limits of each. Substituting the United States as a defendant in the place of a private litigant (a privilege permitted by the law of 1824), the case supposed and satisfactorily

north latitude, and between the rivers Mississippi and Perdido, in what is now the State of Alabama, after the

answered in the quotation just made, is precisely in all its features that now before the court; and to sustain the pretensions of the appellee, it is indispensable that the American construction of the treaty of St. Ildefonso be rejected, and the Spanish construction need to be the true one.' In the case of *Garcia v. Lee*, this court say: 'The controversy, in relation to the country between the Mississippi and Perdido Rivers, and the validity of the grants made by Spain in the disputed territory, after the cession of Louisiana to the United States, were carefully examined and decided in the case of *Foster and Elam v. Neilson*. The Supreme Court, in that case, decided that the question of boundary, between the United States and Spain, was a question for the political department of the government; that the legislative and executive branches having decided the question, the courts of the United States were bound to regard the boundary determined by them to be the true one; that grants, made by the Spanish authorities, of lands which, according to the boundary line, belonged to the United States, gave no title to the grantees in opposition to those claiming under the United States. Has the law, as expounded in the case of *Foster and Elam v. Neilson*, and of *Garcia v. Lee*, been in any respect changed by the Act of 1844? Has that act enlarged the rights of claimants under French or Spanish titles, or restricted the rights of the United States, as derived from the treaties of St. Ildefonso and of Paris? Beyond an extension of the modes of proceeding allowed by the Act of 1824 to claimants in Missouri, to persons claiming under Spanish, French, or British titles, within the States of Louisiana and Arkansas, and within those portions of the States of Mississippi and Alabama lying south of the thirty-first degree of north latitude, and between the Rivers Mississippi and Perdido, we can perceive no change in the Act of 1824 effected by the Act of 1844. We are unable to perceive any addition made by the latter act to the intrinsic strength of the claims allowed to be prosecuted, or any dispensation from proofs of their being *bona fide*, or of a single condition prescribed in relation to their origin and character by the Act of 1824. What are the conditions prescribed by this Act, as indispensable to the allowance and establishment of titles derived from France or Spain, has been stated in a previous part of this opinion, and having shown the title of the appellee to be wanting in all those conditions, it is the opinion of this court that his petition should have been rejected, and, therefore, that the judgment of the district court, pronounced in this cause, should be reversed, and the same is hereby reversed."

See also *Davies v. The Police Jury of Concordia*, 9 Howard, 280, where the court laid down the principle, that when territory is ceded, the

definitive treaty of peace between Great Britain, France, and Spain, by which the territory in which the land was situated was ceded to Great Britain (10th Feb. 1763), the grant was held to be void.¹

§ 337. As to the particular officers having authority to grant lands in the territory embraced within the Acts of 1824 and 1844, it has been ascertained that the Governor-General of Louisiana, the Commandant of the port of New Madrid, acting as sub-delegate, and under the instructions of the Governor-General, and the Lieutenant-Governor of Upper Louisiana, had authority to contract and give concessions and make orders of survey, by first decrees, either with or without conditions.²

§ 338. The question, then, that arises under the Act of 1824, as revised by the Act of 1844, is, whether, in a case where a party claims to hold a paper title, consisting of a grant from the former authorities of the country,³ the land had been severed from the public domain before the cession. If the grant was a gratuitous concession, given for the purpose of cultivation or of raising cattle, and no actual possession was taken during the existence of the government making the concession, no equity was imposed on the government of the United States; and if the party had taken possession, but had no survey executed during the time when

national character for commercial purposes continues until actual delivery; but between the time of signing the treaty and actual delivery of the territory, the sovereignty of the ceding power ceases, except for strictly municipal purposes, or such an exercise of it as is necessary to preserve and enforce the sanctions of its social condition. The power to grant land or franchises is one of the attributes of sovereignty which ceases.

¹ *Montault v. The United States*, 12 Howard, 47.

² *Glenn v. The United States*, 13 Howard, 250, 257; *Soulard v. The United States*, 10 Peters, 100.

³ Under the Acts of 1824 and 1844, the district court had no power to act upon a case of mere naked possession, unaccompanied by any paper title. *The U. S. v. Power's Heirs*, 11 Howard, 570.

that government exercised jurisdiction, he must establish the boundaries of his grant, and identify the land with such certainty as to show what particular tract was severed from the public domain.¹ And it must appear that the particular tract was severed from the public domain, either by actual survey, or by some ascertained limits or mode of separation recognised by a competent authority.²

§ 339. What constitutes a grant or concession, or what is to be deemed the inception of one of the inchoate titles which are cognizable under the Act of 1824, is, of course, a question of construction upon the title-papers, or other written acts of the government, by which the land is alleged to have been separated from the public domain, and impressed with the character of private property.³ It seems that the Supreme Court of the United States, in construing these instruments, will look for some words of grant, not in the technical language of common law conveyances, but in the terms which were usually employed by the Spanish colonial authorities to evince the intention of severing the land from the royal domain, and conveying it as individual private property.⁴ What effect is to be given to the language of these instruments depends upon the Spanish laws in force in Louisiana at the time they were issued, and these laws must be judicially noticed and expounded by the court, like the laws affecting titles to real property in any other state.

¹ *The United States v. Boisdoré*, 11 Howard, 63.

² *Lecompte v. The U. States*, 11 Howard, 115, 127.

³ See the very important cases of *The United States v. Philadelphia and New Orleans*, 11 Peters, 609, on the "Bastrop" claim; *The United States v. King*, 3 Howard, 773, S. C., 7 Howard, 833, upon the "Maison Rouge" claim. Both of these cases arose under peculiar contracts with the Spanish government for the formation of colonies, and the question substantially was, whether the papers containing the supposed grants were to be considered as conveying a property in the territory designated to the party who contracted to introduce the settlers. See, also, *The United States v. Turner*, 11 Howard, 663, on the same titles.

⁴ *U. States v. King*, 7 How. 833, 852.

They are questions of law and not questions of fact. The laws of a state of the Union cannot be treated as the laws of a foreign nation, and ascertained and determined as a matter of fact, by a jury, upon the testimony of witnesses.¹

§ 340. And where the title-papers amount to a severance, or evince an intention to sever the land from the public domain, the conditions expressed or implied by the concession must have been performed. Thus, where the land claimed to have been sold by the Spanish authorities for a sum of money, had its front on the Mississippi River, and it was found to be an ordinance of the government under which the claim originated, that the front proprietors of land on the river should make mounds or levees, and also to clear and ditch the whole front of the depth of two arpents, within three years from the date of the purchase, in default whereof the land reverted to the king, and this condition had not been complied with, and the alleged proprietor had asserted no claim from 1798 to 1835, the presumption was held to be that he surrendered his purchase, and had his money refunded.² So, too, where the regulations required that the grantee should take possession and put under labor a certain quantity of the land, within three years, as a preliminary to a survey and a complete title, and this had never been done, and no claim had been set up from 1779 to 1847, the same presumption was applied.³

§ 341. The effect of conditions imposed by the express terms of the concession, or of a contract between the authorities of the government and the petitioner for a grant, was

¹ The United States *v.* Turner, 11 Howard, 663, 668.

² The United States *v.* Moore, 12 Howard, 209. Upon the point of lapse of time, in this case, it appeared that the government had taken possession, and had sold out the lands to a great extent. The court said that the private owners could have relied on the lapse of time, as a bar, and, upon principle, their vendor could likewise do so.

³ The United States *v.* Hughes, 13 Howard, 1.

much considered in Glen's case upon the "Clamorgan" claim. Clamorgan, under whom the plaintiff claimed, had obtained a concession from competent authority of a large tract of land, for the express purpose of introducing a colony from Canada for the cultivation and manufacture of hemp, in Upper Louisiana. The title-papers consisted of his petition to the commandant (who acted under the instructions of the governor-general), and the commandant's decree endorsed thereon. From both these instruments taken together, it was apparent that the introduction of the colony, and the commencement of the cultivation and manufacture of hemp, were conditions precedent to the existence of a right in Clamorgan to apply for a perfect title, or to have a public survey. The concession was made in 1796; but no possession was ever taken by Clamorgan, nor was the land surveyed prior to the time when Upper Louisiana was delivered to the United States (in March, 1804), nor had any claimant under Clamorgan ever had possession since. The court distinguished this case from Arredondo's¹ by pointing out the distinction between the Florida titles under the Act of 1828, and the Louisiana titles under the Act of 1824. The former embraced perfect titles, the latter only imperfect titles. Arredondo's case was a grant in absolute property, and was founded on a perfect title, complete by all the sanctions of the Spanish law; and although there was a condition, it was a condition subsequent to the vesting of the land, and its performance having become impossible by the act of the grantor, it was held to be discharged. Clamorgan's case was an inchoate title, and the right to have it made complete did not vest until the performance of the condition precedent on which the concession was made.²

¹ 6 Peters, 691.

² Glenn v. The United States, 13 Howard, 250, 256. In this case, the Supreme Court said: "Thus it appears that Clamorgan got the paper-title relied on, in the ordinary form, and which he retained in his own hands, until after Upper Louisiana was delivered to the United States in March, 1804. No possession was taken of the land, or any part of it, nor was it surveyed during the time Spain governed the country, nor has any

§ 342. In like manner, where a concession had been made upon the express condition that a road and clearing should

claimant under Clamorgan ever had possession, so far as this record shows. The surveys produced to us are private ones, and of no value in support of the claim. And this brings us to a consideration of the mere title-paper standing alone. On its true meaning this controversy depends. 1. The petition of Clamorgan, and Delassus's decree on it, must be construed together, there being a proposition to do certain acts on the one side, and an acceptance on the other, limited by several restrictions. 2. What is stated in either paper, as to facts or intent, must be taken as true. Such are the rules laid down in *Boisdoré's case*, 11 How. 87, and which apply here. The country was vacant, and greatly needed population, which could only be drawn from abroad; and this population Clamorgan stipulated that he would supply, and establish a colony from Canada on the island.

"That he would introduce cultivators of hemp, and artisans skilled in the manufacture of cordage, and would grow hemp and make cordage to an extent so large as to be of national consequence. On the faith of these promises the grant was made. As already stated, no step was taken by Clamorgan to perform the contract. All that he did was a presentation of his petition, and the obtaining of Delassus's approval and decree on it.

"This paper he retained about thirteen years, when it was assigned to Pierre Choteau, May 2d, 1809, by a deed of conveyance for the land claimed. In view of these facts several legal considerations arise. It was held in *Arredondo's case*, 6 Peters, 711, that by consenting to be sued, the United States had submitted to judicial action, and considered the suit as of a purely judicial character, which the court were bound to decide as between man and man litigating the same subject-matter, and that in thus deciding the courts were restricted within the limits, and governed by the rules Congress has prescribed. The principal rules applicable here, are, that in settling the question of validity of title, we are required by the Act of 1824 to proceed in conformity with the principles of justice, according to the law of nations, the stipulations of the treaty by which the country was acquired, and the proceedings under the same, the several Acts of Congress in relation thereto, and the laws and ordinances of the government from which the claim is alleged to have been deduced. When deciding according to the law of nations and the stipulations of the treaty, we are bound to hold that such title as Clamorgan had by his concession, or first decree, stood secured to him as private property, and that the claim being assignable, the complainants represent Clamorgan, and this brings us to the question as to what right was acquired by the concession, according to the laws and ordinances of the

be made within one year, and an establishment be made upon the land within three years, and neither of these conditions

Spanish colonial government existing and in force when the grant was made. By these the Commandant, Delassus, had authority to contract and give concessions, and make orders of survey by first decrees, either with or without conditions, as this court held in the case of *Soulard v. The United States*, 10 Pet. 144, provided the concession was founded on a consideration *prima facie* good, either past, when the concession was made, or to follow in future. Here the consideration was to arise by future performance on the part of the grantee. But it is insisted that, forasmuch as a title vested in Clamorgan by the grant to him, even admitting that it was encumbered with conditions, still, as their performance was to happen, subsequent to the vesting of the estate, the want of performance could only be taken advantage of by a proceeding instituted by government for that especial purpose. Nor could want of performance be set up as a defence in this suit. If the premises assumed were true, the conclusion would necessarily follow, and Arredondo's case is relied on in support of this position, and as governing the present case. That proceeding was founded on a perfect title, having every sanction the Spanish government could confer. It was brought before the courts according to the 6th section of the Act of May 23, 1828, which embraced perfect titles, and was only applicable to suits in Florida. The subsequent condition there relied on to annul the grant was rendered immaterial, and perhaps impossible, by the grantor himself, as this court held; and the grantee discharged from its performance. But, in Clamorgan's case, the conditions to occupy and cultivate were precedent conditions; they addressed themselves to the Governor-General, and their performance was required in advance. Before any right existed in Clamorgan to apply for a complete title, or even to have a public survey, preparatory to such application, he was bound by his contract to establish his colony on the land; and furthermore, to set up his manufactory to make cordage, and to supply it with hemp grown on the land, unless these conditions were waived on the part of the Spanish government. And as we are called on by the complainants to adjudge the validity of this claim, and to order that a patent shall issue for the land in the name of the United States, it necessarily follows the same duty is imposed on us that would have devolved upon the Governor-General, had the Spanish government continued in Louisiana. By the Spanish regulations, Clamorgan was not recognised as owner of a legal title without the further act of the King's deputy, the Governor-General, or the Intendant-General, after the power to make perfect grants was conferred on him. Until this was done, the legal title remained in the Crown; and the same rule has been applied in this country. No standing can be allowed to imperfect and

had been complied with, and possession was not taken until after the cession of the country to the United States, it was

unrecognised claims in the ordinary judicial tribunals, until confirmed either by Congress directly, or by a special tribunal constituted by Congress for that purpose. For our opinion more at large on this subject, we refer to the case of *Monard v. Massey*, 8 How. 305, 306, 307. As we are asked to decree the final title, and bound to do so in like manner that the Spanish Governor-General, or Intendant, was bound, it follows we may refuse, for the same legal reasons that they could refuse. And the question presented is, whether we are bound to refuse, according to the face of the contract sued on, and in conformity with our previous decisions in other cases depending on similar principles? Very many applications made for perfect titles to the district courts, under the Act of 1824, have been resisted, because subsequent conditions had not been complied with: first, such as mill grants in Florida, where the usual quantity of sixteen thousand acres was given by concession, with a condition that the mill should be built within a specified time; second, where grants were made for the purpose of cultivation, and no cultivation followed, as in the case of *Wiggins* (14 Peters), and of *Boisdoré* (11 How.); third, where by the concession parties were required by special regulations to levee and ditch on the river's front in Lower Louisiana. These were subsequent conditions, just as much as the introduction of a colony of hemp-growers, and the manufacture of cordage, by *Clamorgan*, and yet no one has ever successfully maintained that a party having such concessions could hold the land and obtain a perfect title, although he did not build the mill, nor occupy and cultivate, nor levee and ditch, founded on the assumption that performance was unnecessary.

"In all these cases it was held that performance was a condition precedent, and the real equity on which a favorable decree for a patent could be founded under the Act of 1824. If *Clamorgan's* concession carries with it conditions similar in principle, it must abide by the settled rule of decision. This depends on the true meaning of his contract with the Spanish authorities. He agreed to establish a colony by introducing a foreign population, and to grow hemp and manufacture cordage to an amount so large as to make it a national object. By these promises he obtained a concession for more than half a million acres of land. A promise of performance was the sole ground on which the Spanish commandant made the concession; and actual performance was to be the consideration on which a complete title could issue. So far from complying, *Clamorgan* never took a single step after the agreement was made; and in 1809 sold out his claim on speculation, for the paltry sum of fifteen hundred dollars. Under these circumstances, we are called on to decide in his favor, according to the principles of justice; this being the rule

held that the land was forfeited, for the same reasons as those which governed the preceding case.¹

prescribed to us by the Act of 1824 and the Spanish regulations. To hold that an individual should have decreed to him, or to his assignees, a domain of land more than equal to seven hundred square miles, for no better reason than that he had the ingenuity to induce a Spanish commandant to grant the concession, founded on extravagant promises, not one of which was ever complied with, would shock all sense of justice. And such decision would be equally contrary to the policy pursued by Spain, which was to make grants for the purposes of settlement and inhabitation, and not to the end of mere speculation. We so held in *Boisdoré's case* (11 How. 96), and the principle applies even more strongly in this case than it did in that, as there something was done towards compliance, and here nothing has been attempted. The remaining ground, on which the complainants demand a confirmation, is the following: because, if the concession was upon conditions which should have been complied with in order to vest the estate as against Spain, whilst the conditions were practicable, and might have been performed by the grantee, the estate vested without such performance, because the province was ceded by Spain before the time for performance had expired, and because of the change of government, manners, &c., consequent on that cession. That *Clamorgan* could take no steps after the change of government, is not open to controversy. By the 14th section of the Act of March 28, 1804, which established the territories of Orleans and Louisiana, *Clamorgan* was prevented from doing any further act in support of his title had he been disposed so to do. He was positively prohibited from making settlements on the land, or making a survey of it, under the penalty of fine and imprisonment. But no advantage resulted from this provision to claimants whose concessions carried with them conditions that had not been complied with. The 1st section of the Act of 1824, in conformity to which we are now exercising jurisdiction, limits the courts, as to the validity and standing of the various claims, to the condition they held before the 10th of March, 1804.

“By the 3d article of the treaty of cession by which Louisiana was acquired, it was stipulated that the inhabitants of the ceded country should be admitted as soon as possible, and become citizens of the United States, and be maintained in the free enjoyment of their property in the

¹ *Heirs of De Vilemont v. The United States*, 13 Howard, 261. The excuses offered for non-compliance with the conditions were that the grantee was commandant at the post of Arkansas, and could not leave his station, and that the Indians were hostile; but the court held that he must have known these circumstances when he obtained the grant.

§ 343. Having thus stated the results of various adjudications upon the Florida and the Louisiana titles, under the several Acts of Congress which have provided for their examination, we are now to examine the recent statute passed for a similar purpose with reference to land titles in California.

§ 344. The Treaty of Peace, Limits, and Settlement, between the United States and Mexico, of February 2d, 1848, commonly called the Treaty of Guadalupe Hidalgo, confirmed and ceded to the United States large portions of the

mean time. But no time was provided by the treaty within which conditions appertaining to imperfect grants of land might be performed: this was left to the justice and discretion of our government; and in a due exercise of that discretion, the Acts of 1804 and 1824 were passed, and to these Acts of Congress, the 2d section of the Act of 1824 commands us to conform. The treaty addressed itself to the political department; and up to the passing of the Act of 1824, that department alone had power to perfect titles, and administer equities to claimants, and when judicial cognizance was conferred on the courts of justice to determine questions of title between the government and individuals, the limits of that jurisdiction were prescribed, to wit, that no act done by the Spanish authorities, or by an individual claimant, after the 3d day of March, 1804, should have any effect on the title, but that its validity should be determined according to its condition at that date. All claims lying within the territory acquired by the treaty of 1803, which have been brought before the courts, according to the Acts of 1824 and 1844, have been compelled to abide by this test. Great numbers have been rejected, because the conditions of occupation and cultivation had not been complied with before the restraining Act of 1804 was passed, or before the 10th day of March, 1804. Nor have the claimants under Clamorgan more right to complain than others; his neglect extended through nearly eight years, during the existence of the Spanish government, whereas many similar claims have been rejected, where the neglect was not half so long. If Clamorgan could come forward because of the prohibition, and be heard to excuse himself from performing the onerous conditions his contract imposed, so could every other claimant who had neither taken possession, nor in any manner complied with his contract, do the same. And on this assumption, concessions issued by France and Spain would be without condition, and a simple grant of the land described in the paper. Its genuineness and proof of identity of the land would settle the question of title."

former territory of Mexico, of which the present State of California is a part. It stipulated for the protection of the property of no other persons than Mexicans, resident or non-resident, within the ceded territories. With regard to these, it provided, that Mexicans, established in the ceded territories, should be free to remain, or to remove at any time, "retaining the property which they possess, or disposing thereof, and removing the proceeds, without their being subjected, on this account, to any contribution, tax, or charge whatever." Those who should prefer to remain, were either to retain the title and rights of Mexican citizens, or to become citizens of the United States, making their election in one year from the exchange of ratifications, and at the expiration of the year, those who should have remained without signifying their election, should be deemed to have elected to become citizens of the United States. The further provision was then made, that "in the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans, who may hereafter acquire said property by contract, shall enjoy, with respect to it, guaranties equally ample, as if the same belonged to citizens of the United States."¹

§ 345. After the United States had taken possession of the territories described in this treaty, a special agent was appointed to examine and report upon the origin and state of the land titles in California. From the report of this agent, it appeared that most of the grants of land made to individuals in California, although not all, were made after the establishment of the independence of Mexico, and under a system of rules and regulations established by the central government of that republic. The public domain was dealt with by the government in four different forms:—1. In grants to individuals; 2. In village lots or lands set apart for the

¹ See Art. VIII. of the Treaty, 9th Stat. at Large, 929.

foundation of a town; 3. In the peculiar system of occupation called "Missions;" 4. In the recognition of certain rights of possession and occupation by the Indians. The first class, or grants made by the government to individuals, comprehended two species of titles: one, where the grant was made directly to individual settlers, or families, which were by law restricted to eleven "*sitios*," a "*sitio*" being one league square: the other, colonization grants (of a larger quantity), or contracts with "*empresarios*," or persons who should undertake, for a consideration in land, to bring families to the country for the purpose of colonization. Both of these species of title appeared to have originated with the territorial governor, under the Mexican colonization law of Aug. 18th, 1824, and the government regulations in pursuance of it adopted Nov. 21st, 1828. His concession, however, in the case of the *sitios*, or individual grants, required confirmation by the territorial deputation, and in case of rejection by them, the *governor* was required to appeal to the supreme government. The colonization grants were required to be confirmed by the supreme government. The greater part of these individual titles in the country appeared to have originated in this way under the Mexican government; but there were probably others which were derived from the Spanish authorities.¹

§ 346. The village lots, or lands granted for the establishment of a town, originated with the Spanish or Mexican authorities, under a peculiar system, for the settlement of the country. The mission lands were establishments of a peculiar character, first originating under the Spanish government, the tenure of which, in the opinion of the agent, did not separate them from the public domain. The Indian rights were the rights of possession and occupation, which the general principles of Spanish or Mexican law, or some special provision, had confirmed to the Indians.

¹ Of the *empresaria* grants, I am informed that there are probably not more than two or three in California.

§ 347. These general statements will suffice to explain the apparent purpose of the Act of Congress of March 3, 1851, "to ascertain and settle the private land claims in the State of California." It appears from the report above referred to, which was made to the Department of the Interior, and laid before Congress in April, 1850, that the government of the United States, before the passing of the act above referred to, were informed of the general situation of land-titles in that country; that one class of these titles, those of individuals, originating under grants of the governor of the territory, embraced both perfect and imperfect titles, or those where every formality necessary to perfect a title had been had, and those where an inceptive title had been obtained, but something remained to be done to complete it; that other lands were held under the village or corporation grants, which originated under a different system, and that other claims might have originated under the mission lands, the precise nature and situation of which, as respects the government, was not fully ascertained;¹ and further, that the Indians had rights, recognised to some extent.

§ 348. The Act of Congress of March 3, 1851, provided for a board of commissioners "for the purpose of ascertaining and settling private land claims in the State of California."² The 8th section of the Act was as follows: "That each and every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to pro-

¹ Although the agent expressed his decided opinion that the tenure of the mission lands did not separate them from the public domain, Congress evidently intended to adopt no view of this question, by directing the commissioners appointed under the Act to ascertain and report upon this tenure. And see Halleck's Report.

² 9 Stat. at Large, 631-634.

ceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the District Attorney of the United States in and for the district in which such decision shall be rendered."

§ 349. The ninth and tenth sections provided that in all cases of the rejection or confirmation of any claim by the board of commissioners, the claimant, or the District Attorney, in behalf of the United States, may present a petition to the district court praying for a review of the decision of the commissioners, and for a decision on the validity of the claim; and that the district court shall proceed to render judgment upon the pleadings and evidence in the case, from which an appeal may be taken to the Supreme Court of the United States.¹

§ 350. The *eleventh* section is as follows: "That the commissioners herein provided for, and the district and supreme courts, in deciding on the validity of any claim brought before them, under the provisions of this act, shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable."

§ 351. The *thirteenth* section provided that all lands in California to which claims shall not be established as directed by the act, shall be taken to be a part of the public domain of the United States; that patents shall issue for lands, the claims to which shall be confirmed, and the plat shall be sur-

¹ By an Act passed August 31, 1852, § 12, ch. 108, (an appropriation act,) appeals were authorized directly from the commissioners to the District Court. *Quare*, as to the constitutionality of this provision.

veyed by the surveyor-general of California ; and that opportunity shall be given to other persons to contest the title.

§ 352. The *fourteenth* section provided, "That the provisions of the act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican governments, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town, or village existed on the seventh day of July, eighteen hundred and forty-six ; but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village, was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of said city, town, or village, on the said seventh of July, eighteen hundred and forty-six, being duly proved, shall be *prima facie* evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim ; and where any city, town, or village, shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town, or village."

§ 353. The *fifteenth* section declares that the final decrees of the commissioners, or of the District or Supreme Court, or any patent issued under the act, shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons. The *sixteenth* section makes it the duty of the commissioners to ascertain and report to the Department of the Interior the tenure by which the mission lands are held, and the lands held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by "Pueblos or Rancheros Indians."

§ 354. It will be apparent from this recital of the sub-

stance of this act, that it was the intention of Congress to subject to judicial revision and sanction all the claims to land in California originating in grants to individuals by the former government of the country. The language of the eighth section embraces the claim or title of "each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government;" and the thirteenth section declares that the lands, the claims to which shall have been finally rejected, or which have not been presented to the commissioners within two years from the date of the act, shall be deemed part of the public domain of the United States. But the fourteenth section of the act excepts from its operation certain lots described as town lots, and it is not entirely clear how this exception was intended to operate. The mode of proceeding prescribed by the eighth section, which applies to the claim of every person who claims by virtue of any right or title derived from the Spanish or Mexican government, appears to open the whole question of title, including the evidence of the original grant, and its validity. The object of the eleventh section appears to have been to establish a presumption of a grant, in the absence of evidence to the contrary, in the case of lands held by cities, towns, or villages, or by individuals claiming under them, where the city, &c., existed before July 7, 1846. It enumerates, 1, the cases of town lots, farm lots, or pasture lots, held (by individuals) under a grant from any corporation or town, to which lands may have been granted for the establishment of a town; 2, city, town, or village lots (held by the city, &c.), where the city, town, or village existed on the 7th of July, 1846; and in both of these cases it directs that the claim shall be presented by the corporate authorities of the town, or by or in the name of the individual to whom the original grant was made for the establishment of a town, &c.; and in these cases, that is, of town lots, where the grant was originally made to an individual (for the establishment of a town), or made to the town, proof of the existence of the town prior to July 7th, 1846, is to be taken as *prima facie*

evidence of a grant to the corporation, or to the individual under whom the lot-holders claim. The further provision is then made, that where any city, town, or village, shall be in existence at the date of the Act, March 3, 1851, the claim for the land embraced within the limits of the same may be made by the corporate authority. This must relate to cities, &c., not in existence prior to July 7, 1846, in regard to which the presumption of a grant is not to be adopted.

§ 355. One of the first questions that must arise under this act, will be, whether the commissioners and the District and Supreme Courts of the United States are authorized to act upon titles that were inchoate at the time of the cession, and if so, under what circumstances an imperfect title may be confirmed. I conceive that the question arising under this law, like that arising under the acts relating to the Florida and Louisiana claims, must be, substantially, whether there was an incipient title at the time of the treaty, capable of being perfected under the Mexican government; or, in other words, whether the land had been severed from the public domain by acts on the part of the government, which gave the claimant an equitable right to have all the further acts of confirmation which the law made requisite to a perfect title. This view is supported by the provisions of the treaty and those of the statute. In the first place, the treaty stipulates for the protection of the property of Mexicans, resident and non-resident; and in regard to the non-residents, it takes care to provide that "property of every kind" "shall be inviolably respected." With regard to the resident inhabitants of the country, the provision of the treaty gives them the right to remain or to remove, at any time, to the Mexican republic, retaining, in either case, the property which they possess in the territory, or disposing of it and removing the proceeds. These provisions extend somewhat beyond those of the law of nations. The doctrine of the law of nations is, as we have seen in a former part of this chapter, that the inhabitants of a ceded or conquered

country retain their property and rights of property, without treaty stipulation to that effect, and that the cession conveys to the new sovereign, besides the political sovereignty of the country, no other property than such as belonged to the old one.¹ But the law of nations is not understood to provide, in respect of landed property, for a right of removal of the inhabitants into the dominions of their former sovereign, or for the case of those who were not inhabitants of the country at the time of the cession. The stipulations of the treaty, therefore, in these respects, are additional to the provisions of the law of nations, and not cumulative.

§ 356. The cession of California, therefore, by the treaty of Guadalupe Hidalgo, left the property of the inhabitants of the country under the protection of that principle of the law of nations which protects private property of the inhabitants of a ceded country in all cases of cession, and under the further protection of the treaty, which gives to the Mexican inhabitants the right to remain or to remove, still retaining their property in the territory; and it left the property of the non-resident Mexicans under the special provision of the treaty, which declared that their property of every kind should be inviolably respected, and that they, their heirs and assigns, should enjoy, with respect to it, the same guarantees as if it belonged to citizens of the United States. Now, it is a well-settled rule, that an inchoate title to lands is property in the sense of the law of nations, as well as in the contemplation of a treaty; that the law of nations means to protect, in cases of cession, all the rights of property which were recognised as rights by the former sovereign, and to give to them the same effect that the former sovereign would have given; and, therefore, in the case of an imperfect title, or one where the first steps only had been taken for the acquisition of a complete title, the question is, whether a right had so attached, as to affect the conscience of the former sovereign with a trust, and make him a trustee

¹ Ante, § 287, 292.

for the individual, because the acts done amount in equity to a severance of the land from the public domain, before and at the time of the cession.¹

§ 357. The statute which directs the adjudication of land claims in California, does not apply solely to cases of strict title. It directs an inquiry into the case of "each and every person claiming lands in California by virtue of *any right or title* derived from the Spanish or Mexican government;" and it is "the validity of the said *claim*" that is to be adjudicated. It is, moreover, to be adjudicated according to the provisions of the treaty, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.² The act, therefore, adopts the whole body of the rules of the law of nations, which regulate the rights of the inhabitants of a ceded country, and which recognise inchoate rights as rights of property. It adopts, also, as the means of determining whether a right of any kind existed, the laws, usages, and customs of the government from which the claim is derived. It adopts the principles of equity as the basis of the adjudication which is to be made between the United States and an individual; and finally, it adopts the decisions of the Supreme Court, so far as they are applicable, that is to say, so far as they have declared or recognised the principles of the law of nations, or have furnished rules of determination, as to the origin of rights under the laws, usages, and customs of the former government, or have established the principles of equity applicable to claims of this nature, when asserted by individuals against the United States. It is quite clear, therefore, that cases may arise under this act, where the right of the party is inchoate, and where the inquiry must be whether, according to the laws, usages, and customs of the government, from which the

¹ *Smith v. The United States*, 10 Peters, 326; *The United States v. Boisdoré*, 11 Howard, 63.

² Act of March 3, 1851, § 8, 11.

claim is derived, acts had been done which gave the claimant an equitable right to a full and perfect title; or, in other words, which amounted in equity to a severance of the land from the public domain. For example, the question may arise whether a concession, made in due form by the territorial Governor of California, and possession taken under the same, gave the party any right which the United States is bound to recognise, without the approval of the territorial deputation, according to the Mexican executive regulations of 1828. We have seen that in the case of the "*sitios*" or individual grants, the concessions of the territorial governor required confirmation by the territorial deputation; and in case of rejection by them, the governor was directed to appeal to the supreme government. The language of the regulation does not appear to make the consent or approval of the territorial deputation the inception of the right; on the contrary, it appears to provide that the concession of the governor shall not operate as a complete and perfect title until the consent of the deputation has been obtained. If this is a correct view of the regulation, then the question remains open, whether, taking into view the provisions of the Mexican law, the concession of the governor is to be regarded as the inception of the right, and as conferring upon the party a right to obtain either the approval of the territorial deputation or that of the supreme government. If such is the true character of the governor's concession, and if, upon the principles and rules of the Mexican law, there are no circumstances which show that the party could not have obtained the approval of the territorial deputation, or that of the supreme government, either from the non-fulfilment of conditions, or want of compliance with general regulations, or because he was not within the policy of the laws regulating grants of the public lands, then I conceive that the United States would be bound to regard his claim to the land as valid.¹

¹ The original text of the 5th section of the regulations of 1828 is as follows: "Las concesiones hechas á personas o familias particulares no

se tendàn por valederas definitivamente, sin privia consentimiento de la Diputacion Territorial, à cuyo effecto se pasaràn à esto los expedientes respectivos."

"Concessions made to individuals or particular families shall not be held definitively binding without the previous consent of the Territorial Deputation, to which effect there shall be transmitted to it the respective records." (The word *expediente* in Spanish legislation has a peculiar meaning, which is not well expressed by our English word record. It means, in this connexion, the title paper or papers issued by the governor.) The force of this provision does not appear to me to be materially affected, whether we adopt the translation "shall not be held definitively binding," or translate the clause, "shall not be definitively held binding," "without the previous consent of the Territorial Deputation," &c. The meaning of the provision would seem to be, that until the consent of the territorial deputation has been given, the concession of the governor shall not be held to give a valid, or complete, or perfect title. This may well consist with the doctrine that the concession of the governor gives an inchoate or imperfect right to the land, which is to become complete and perfect by the consent of the deputation. But it would occupy too much space, and result in the discussion of questions which must soon be before the Supreme Court, to enter here into an examination of the various provisions of Mexican law, which tend to show that the concession of the territorial governor did or did not create any right to the land, before the consent of the deputation had been obtained. I have been favored with the perusal of a learned and elaborate argument made by George W. Cooley, Esq., late government agent, before the California land commission, in a case in which this question arose, and in which it is discussed with great ability and research.

CHAPTER VI.

PRACTICE OF THE SUPREME COURT OF THE UNITED STATES
IN WRITS OF ERROR.

§ 358. A WRIT of error being the process by which the record of an inferior court, in an action at law, is removed into an appellate court, for a re-examination of the grounds of the judgment, so far as they involve matters of law, we are first to state the mode in which that process is issued to the circuit courts of the United States, and to the state courts, under the twenty-second and twenty-fifth sections of the Judiciary Act, and the proceedings which follow thereon.

§ 359. The twenty-second section of the Judiciary Act provides that final judgments of the circuit courts, where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, may be re-examined, and reversed or affirmed in the Supreme Court, by a writ of error brought within five years after the judgment was rendered, whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by a judge of the circuit court, or justice of the Supreme Court, and the adverse party having at least thirty days' notice. The twenty-fifth section makes the same provisions with respect to writs of error to certain judgments or decrees of state courts, except that the citation is to be signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree com-

plained of, or by a justice of the Supreme Court of the United States.¹

§ 360. The period of five years, within which the writ of error is to be brought, is to be calculated from the time of rendering the judgment to the day when the writ is filed in the court where the judgment was rendered. The day on which the writ of error is issued, or the day on which it is tested, are not material; but if the day on which it is filed be more than five years from the date of the entering of the judgment, the statute limitation of time is passed, and the writ is barred.²

¹ As to the judgments of state courts subject to being re-examined in the Supreme Court of the United States, see § 115.

² *Brooks v. Norris*, 11 Howard, 204, 207. Mr. Chief Justice Taney, delivering the opinion of the court in this case, said: "This case is brought here by writ of error upon a judgment rendered in the Supreme Court of the State of Louisiana, and a motion has been made to dismiss the writ.

"It appears by the record that the judgment was rendered on the 25th of October, 1843. The writ of error, by which the case is brought here was allowed by the chief justice of the state court, upon the petition of the appellant, on the 19th of October, 1848, and the bond also bears date on that day. But the writ of error was not issued until the 4th of November following. It was issued by the clerk of the court, in which the judgment was rendered, and, on the same day, as appears by endorsement upon it, filed in that office by the counsel for the plaintiff in error. More than five years from the day of the judgment had, therefore, elapsed when this writ of error was filed.

"The Act of 1789, chap. 20, § 22, provides that writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of. The writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the Act of Congress must be calculated accordingly. The day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question.

"In this case, therefore, five years had elapsed before the writ of error was brought, and the limitation of time in the Act of Congress was a bar to the writ. According to the English practice, the defendant in error

§ 361. As to the parties to a writ of error, it is to be observed, in the first place, that as the object of this process is to bring before the appellate tribunal the judgment of the inferior court for revision, and that such judgment may be reversed, if found incorrect, the party against whom the judgment is rendered can alone sue out the writ. Strangers to the judgment, who are not parties to the record, although they may have an interest in its proceeds, cannot sue out a writ of error. Thus, where land was sold under an execution, and the money arising therefrom was about to be distributed amongst creditors, by an order of the circuit court, and a controversy arose among them as to the priority of their respective judgments, and the circuit court made an order concerning the distribution, whereupon certain of the creditors aggrieved, who were not parties to the judgment, brought a writ of error on the judgment, it was held that the judgment could not thus be re-examined.¹

§ 362. And the parties against whom the judgment is rendered must all join in the writ of error, if it be a joint

must avail himself of this defence by plea. He cannot take advantage of it by motion; nor can the court judicially take notice of it, as the limitation of time is not an objection to the jurisdiction of the court. It is a defence which the defendant in error may or may not rely upon, as he himself thinks proper. But according to the established practice of this court, he need not plead it, but may take advantage of it by motion. The forms of proceeding in the English courts of error have never been adopted or followed in this court. And either party, without any formal assignment of error or plea, may avail himself of any objection which appears upon the record itself. In this case, the bar arising from the lapse of time is apparent on the record, and the defendant may take advantage of it by motion to quash or dismiss the writ.

"As this objection is conclusive, it is unnecessary to inquire whether the writ of error was allowed or issued by proper authority, or what previous defect may be cured by the appearance of the defendant in error. The writ must be dismissed, upon the ground that it is barred by the limitation of time prescribed by the Act of Congress."

¹ *Bayard v. Lombard*, 9 Howard, 530. See also *Boyle v. Zacharie*, 6 Peters, 655.

judgment, unless, on a refusal of some of them to join, the rest obtain a summons and severance. Thus, where there was a joint judgment against three defendants, and the writ of error was sued out by one of them in his own name alone, without joining the others, the court said the writ should have been in the names of all; but that if the others should refuse to join, it would deserve consideration whether the third defendant could not have a summons and severance.¹ But where a judgment was rendered against three defendants upon a joint and several bond of suretyship, and the judgment stated the sums for which the defendants were jointly and severally liable, and one of the defendants, who had taken a separate defence, sued out a writ of error without joining the other two, and they sued out a separate writ of error, and the plaintiffs in error in each writ gave separate appeal bonds, a motion to dismiss, upon the ground that all the defendants should have joined in one writ of error, was overruled.²

§ 363. But all the parties to the judgment must be set out in a writ of error. If a part of the plaintiffs-in-error be described as "others," without naming them, the writ will be dismissed.³ If the plaintiff below, in whose favor a judgment is rendered, intermarries after the judgment, and

¹ *Williams v. The Bank of the United States*, 11 Wheaton, 414. In *Owings and Others v. Kincannon*, 7 Peters, 399, a joint decree was made against six defendants. An appeal was prayed generally from the decree; but in the appeal bond, it was stated that two had prayed an appeal, and nothing was said of the others. The court considered the statement in the bond as explaining the general entry granting the appeal, and dismissed the case, because all the defendants had not joined in the appeal. See also *Heirs of Wilson v. Life and Fire Insurance Co., &c.*, 12 Peters, 140.

² *Cox and Dick v. The United States*, 6 Peters, 172.

³ *Deneale and Others v. Archer*, 8 Peters, 526; *Smyth v. Strader*, 12 Howard, 327. So, too, where a writ of error was issued in the name of "The Heirs of Nicholas Wilson," it was dismissed, because no person was named as plaintiff in error. *Heirs of Wilson v. Life and Fire Insurance Co.*, 12 Peters, 140.

before the service of the writ of error, the service of the citation upon the husband has been held to be sufficient.¹

§ 364. The death of parties to a writ of error to the Supreme Court of the United States affects variously the position of the cause, according to the time when such death occurs, and according to the fact of such decedent being the sole plaintiff or defendant, or only one of several. The twenty-eighth rule of the court provides that when either party shall die, pending a writ of error or appeal, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined, as in other cases. But if such representatives do not voluntarily become parties, the other party may suggest the death upon the record, and obtain an order that unless such representatives shall become parties, within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the same reversed, if it be erroneous.² By a subsequent rule (sixty-one), it is provided, that, when the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.³

¹ *Fairfax's Executor v. Ann Fairfax*, 5 Cranch, 19. *Quere*, Whether the husband should be made a party to the writ of error? It was not done in the above case, but the citation to Ann Fairfax was served on her husband alone. The court held it to be a sufficient service on Ann Fairfax.

² The rule also requires that the order so obtained shall be published. See Rule 27 (Feb. Term, 1821).

³ Rule 61 (Dec. Term, 1851).

§ 365. Where one of several plaintiffs in error dies, the cause of action survives to the others, and it is unnecessary to make the representatives of the deceased parties to the writ of error.¹ But the death of a sole plaintiff in error must be suggested, and leave be obtained to make the representatives parties; and if this be not done, the writ of error will be abated.² If one of two defendants in error dies, after the commencement of the term, and before judgment is entered, it may be entered as against both, on a day prior to the death, *nunc pro tunc*. If the death occurs before the commencement of the term, then upon the suggestion of the death being entered of record, the cause of action surviving, the judgment may be entered against the surviving defendant.³ In like manner, where an appellee died after the commencement of the term,—the court not knowing his decease until after the cause had been decided,—the decree was entered as of the first day of the term.⁴

§ 366. The Judiciary Act of 1789 made no special provision for the issuing or testing of writs of error; but the Act passed May 8, 1792 (ch. 36), for regulating processes in the courts of the United States, provided that all writs and processes issuing from the Supreme or a Circuit Court, shall bear test of the chief justice of the Supreme Court, and made it the duty of the clerk of the Supreme Court to transmit to the clerks of the circuit courts the form of a writ of error, and made it lawful for the clerks of the circuit courts to issue writs of error agreeably to such form as nearly as the case would admit, under the seal of the circuit court, returnable to the Supreme Court.⁵

§ 367. The Act of 1789, section 22, requires the citation to

¹ McKinney v. Carrol, 12 Peters, 66.

² Phillips v. Preston, 11 Howard, 294.

³ M'Nutt v. Bland, 2 Howard, 28.

⁴ Bank of the United States v. Weisiger, 2 Peters, 481.

⁵ Act of May 8, 1792 (ch. 36), § 1, 9.

be signed by a judge of the circuit court in which the judgment was rendered, or by a justice of the Supreme Court, and that the judge or justice signing the citation shall take good and sufficient security for the prosecution of the writ of error. Under these two acts, therefore, the judgment of a circuit court may be carried for re-examination to the Supreme Court, by a writ of error issued by the clerk of the court in which the judgment was rendered, and the citation may be signed and the bond approved by a judge of that court. And as the district judge is a member of the circuit court when sitting for his district, he may sign the citation and approve the bond.¹

§ 368. For the reviewal of judgments rendered in a state court, writs of error issue in like manner from the clerk's office of the circuit courts of the United States, the citation being signed and the bond being taken by the chief justice, or judge, or chancellor of the court in which the judgment was rendered, or by a justice of the Supreme Court of the United States.²

§ 369. In the case of judgments rendered in territorial courts, special provision is usually made by law for writs of error. Where an Act of Congress directed that writs of error might be prosecuted from the judgments of the Supreme Court of the territory of Iowa, in the same manner and under the same regulations as from circuit courts of the United States, it was held that the writ of error might be issued by the clerk of the territorial court, and the citation might be signed and the bond approved by one of the judges.³

§ 370. The service of a writ of error consists in lodging a copy thereof for the adverse party, in the office of the clerk of the court where the judgment was rendered, and in serving a citation upon him to appear in the appellate court at the re-

¹ *Sheppard v. Wilson*, 5 Howard, 210.

² Act of 1789, § 25.

³ *Sheppard v. Wilson*, 5 Howard, 210.

turn term of the writ. The copy of the writ must be lodged in the clerk's office within ten days, Sundays exclusive, after the judgment was rendered, if it is intended to have it operate as a supersedeas. But if it is lodged at any time before the return-day, the service will be good for all other purposes, except that of superseding execution upon the judgment.¹ The Judiciary Act provides that the citation shall be signed by a judge of the circuit court, or a justice of the Supreme Court of the United States, where the writ of error is to a circuit court;² and where it is to a state court, by the chief justice, or judge, or chancellor of the court, rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States.³ This direction is peremptory. The adverse party is not bound to appear in the Supreme Court of the United States, unless the citation is signed in the manner prescribed by law, and the writ of error will be dismissed on motion, for want of such signature.⁴

§ 371. If no citation has been issued, or served, the writ of error may be dismissed on motion,⁵ unless there has been a general appearance. The object of a citation on a writ of error or an appeal, is to give notice of the removal of the cause, and such notice may be waived, by entering a general appearance by counsel. Where an appearance has been entered, the objection that notice has not been given is a mere technicality, and the party wishing to avail himself of it should, at the first term at which he appears, give notice of a motion to dismiss, and that his appearance is entered for that purpose. After a general appearance for one term, a motion to dismiss for want of a citation, or for irregularity in its

¹ *Wood v. Lide*, 4 Cranch, 180.

² Act of 1789, ch. 20, § 22.

³ *Ibid.* § 25.

⁴ As where the citation was signed by the clerk. *United States v. Hodge*, 3 Howard, 534.

⁵ A citation not served, is as no citation. *Lloyd v. Alexander*, 1 Cranch, 365.

service, will not be entertained. But motions may be made to dismiss for want of jurisdiction, or any other sufficient ground which shows that the writ of error or appeal is not regular and authorized by law, after a general appearance, and while such an appearance stands upon the docket.¹ Under the rules of the Supreme Court, it is, in general, of no importance to the plaintiff in error, or appellant, whether an appearance for the defendant in error or appellee is, or is not entered. If the party is entitled to his appeal, or writ of error, and it has been prosecuted according to law, and a citation has been duly served, the refusal or omission of the defendant in error or appellee, will not delay the trial; and a judgment against him will be as conclusive as if an appearance had been entered for him, and the case argued by counsel.²

§ 372. The twenty-second section of the Judiciary Act, requires that the adverse party shall have "at least thirty days' notice." This provision was originally predicated upon the state of things existing at the time of the passage of the Act, when there was no circuit court whose term would not be finished more than forty days before the sitting of the Supreme Court, ten days being allowed by the twenty-third section for the filing of the writ, in order to have it operate as a *supersedeas*. The time of the sessions of the court was subsequently altered, but no alteration was made in the law respecting the thirty days' notice. This rendered it necessary for the Supreme Court to adopt a rule applicable to cases where a writ of error was made returnable at a term commencing in less than thirty days from the time of the service of the citation. The notice contemplated by the statute, is

¹ Where there is a substantial defect in the appeal or writ of error, which shows that the Supreme Court have not jurisdiction to try the cause, or that it is not legally before them, such defect may be taken advantage of, by motion to dismiss, at any time before judgment: *Heirs of Wilson v. Life and Fire Ins. Co. of New York*, 12 Peters, 140.

² *Hogan v. Ross*, 9 Howard, 602; *United States v. Yates*, 6 Howard, 605; *Buckingham v. McLean*, 13 Howard, 150.

a notice of thirty days before the return day of the writ. Accordingly, it was ruled that where the citation had not been served thirty days before the return day of the writ, the court would not take up the cause until the thirty days had expired, unless the defendant in error should appear;¹ and at the same time (Feb. 1803), a rule was made, that "where the writ of error issues within thirty days before the meeting of the court, the defendant in error is at liberty to enter his appearance, and proceed to trial; otherwise the cause must be continued."² Subsequently, it was ruled that where the citation had been served within the thirty days, the cause could only be taken up with the consent of the defendant in error.³

§ 373. It has been held that a misnomer in a citation, when service of the notice was accepted by the attorney for the parties without objection, and the misnomer was not calculated to mislead, is not a ground for dismissing a writ of error.⁴

§ 374. The citation is not necessarily a part of the record, since it forms no part of the proceedings of the court below. The presumption is that one was issued when the writ of error was allowed, and it may be proved *aliunde*.⁵

§ 375. The 22d section of the Judiciary Act requires that "every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fail to make his plea good." The security to be taken under this Act must be sufficient to secure the whole amount of the judgment, and is not to be

¹ Lloyd v. Alexander, 1 Cranch, 365.

² Rule 16, Feb. Term, 1803.

³ Welsh v. Mandeville, 5 Cranch, 321.

⁴ Peale v. Phipps, 8 Howard, 256.

⁵ Innerrarity v. Byrne, 5 Howard, 295. See *post*.

⁶ Act of Sept. 24, 1789.

confined to such damages as the appellate court may adjudge for the delay.¹ But this provision is applicable only to cases where the writ of error operates as a supersedeas;² where it does not so operate, the bond need only be to "such an amount as, in the opinion of the justice or judge taking the same, shall be sufficient to answer all such costs as, upon an affirmance of the judgment or decree, may be adjudged or decreed to the respondent in error."³

§ 376. It need not appear affirmatively from the record that the judge who granted the writ of error took the bond required by the statute. The statute does not require the bond to be returned to the Supreme Court, but directs the judge signing a citation to take security; and the presumption of law is that the directions of the Act have been obeyed.⁴ But if it appears from the record that no bond was taken, the cause will be dismissed.⁵ It has been held that an appeal bond given to The People of the State of New York or the Relator is good, as it might be sued upon by either at the option of the government of the State.⁶

§ 377. The writ of error being duly issued, an authenticated

¹ *Catlett v. Brodie*, 9 Wheaton, 553.

² Unless a writ of error be filed in season to operate as a supersedeas, the Supreme Court will not quash an execution issued by the court below on the judgment. *Wallen v. Williams*, 7 Cranch, 278. And when the judgment of the court below has been affirmed by the Supreme Court, or the writ of error has been dismissed, the stay of execution caused by the writ of error-bond is at an end, and the plaintiff is entitled to his execution immediately upon the judgment. *Hogan v. Ross*, 11 Howard, 294. Where an appeal was taken in a common law case instead of a writ of error, and after the lapse of ten days the plaintiff issued an execution upon his judgment, and the defendant sued out a writ of error to bring the case up to the Supreme Court, it was error in the court below to quash the execution and supersede the judgment. *Saltmarsh v. Tuthill*, 12 Howard, 387.

³ Act of Dec. 12, 1791, ch. 3. ⁴ *Martin v. Hunter*, 1 Wheaton, 304.

⁵ *Boyce v. Grundy*, 6 Peters, 777.

⁶ *Spalding v. The People of the State of New York ex Rel. Backus*, 2 Howard, 66.

transcript of the record must be returned, with the writ of error annexed to it. By an authenticated transcript of the record is meant a transcript authenticated by the seal of the court and the signature of the clerk. By the eleventh rule of the Supreme Court, adopted in 1797, it is ordered "that the clerk of the court to which any writ of error shall be directed may make return of the same by transmitting a true copy of the record, and of all proceedings in the same, under his hand and the seal of the court." The signature of the judge to the record is not required, either by the statute or the rule, whether the case be civil or criminal.¹

§ 378. But no cause can be heard until a complete record, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in the Supreme Court, has been filed;² and if the record contains any documents in a foreign language, it must also contain a translation made under the authority of the court below, or admitted to be correct; otherwise the case will be remanded to the court below to have such translation supplied and inserted in the record.³

§ 379. If the record is incomplete, on suggestion of diminution a *certiorari* will be granted, on motion made in writing, and supported by an affidavit of the facts on which the *certiorari* is asked, unless the facts are admitted by the opposite party. Such motions must be made at the first term of the entry of the cause, unless upon special cause shown the delay is satisfactorily accounted for.⁴ The return of the clerk of the court below to a *certiorari* is sufficient, and the additional or supplementary record sent up need not be signed by a judge.⁵

¹ Worcester v. The State of Georgia, 6 Peters, 515, 536; Martin v. Hunter, 1 Wheat. 304, 361; Buel v. Van Ness, 8 Wheat. 312; McCulloch v. The State of Maryland, 4 Wheat. 316.

² Rule 31, Feb. Term, 1823.

³ Rule 60, Dec. Term, 1851.

⁴ Rule 32, Feb. Term, 1824.

⁵ Stewart v. Ingle, 9 Wheaton, 526.

§ 380. The names of the jurors who tried the cause need not be inserted in the record;¹ but where the citation was not sent up with the record, a *certiorari* was granted, on suggestion that a citation had been served.² This, however, would seem to have been overruled in a subsequent case, in which a motion to dismiss for the want of a citation was denied, the court saying that the citation is not necessarily a part of the record, and that the presumption is, that one was issued when the writ of error was allowed, and that it might be proved *aliunde*.³ But in a still more recent case, it appears that a writ of error was dismissed, because no citation appeared to have been issued for the defendant in error, and the court said, what is obviously true, that the Act of Congress makes the citation necessary to remove a case by writ of error to the Supreme Court.⁴ The result of these various rulings is this: That unless a citation has been served according to the directions of the statute, the plaintiff in error has not obtained a valid right to remove the cause to the Supreme Court; that if the record does not show a citation, the case may be dismissed on motion, unless the plaintiff in error can supply the defect by proof *aliunde* that a citation was served. It is, therefore, prudent to have the citation regularly returned with the record.

§ 381. The form in which the record should be made up, to be returned on a writ of error, is a matter of practice of very considerable importance. It should consist of four parts: 1st. A statement of the pleadings, or their substance; 2d. A statement of the empanelling of the jury to try the issue made by the pleadings, the trial, and the verdict; 3d. The bill of exceptions; 4th. The judgment.

§ 382. The bill of exceptions, which is often very loosely and incorrectly drawn, should contain, by way of recital, so much of the evidence given on the trial, or the material facts, as

¹ *Owens v. Hanney*, 9 Cranch, 180.

² *Field v. Milton*, 3 Cranch, 514.

³ *Inzerarity v. Byrne*, 5 Howard, 295.

⁴ *Hogan v. Ross*, 11 Howard, 294.

is necessary to present the points of law ruled and excepted to, and no more.¹ If a bill of exceptions prays the opinion or instruction of the court upon certain facts, without stating that any evidence of those facts was given to the jury, the appellate court cannot know that they exist in the case.² But the bill of exceptions should contain a recital of facts, or evidence, solely for the purpose of presenting the rulings of the court upon matters of law, of which the plaintiff in error complains. The appellate court has no concern, on a writ of error, with questions of fact, or whether the finding of the jury accords with the weight of the evidence. So far as error is founded upon the bill of exceptions incorporated into the record, it lies only to exceptions taken at the trial to the ruling of the law by the court, and to the admission or rejection of evidence.³ And although, where a bill of exceptions is imperfectly drawn, the appellate court will proceed to decide the cause, if it can ascertain the substance of the facts, and the questions on which the judge instructed the jury are apparent;⁴ yet the exceptions cannot be altered or amended in the appellate court, either by referring to the charge at length, or the notes of the presiding judge, nor can any part of the charge be revised in the appellate court, unless the judge below certifies under his seal that it was excepted to at the trial. If a diminution is suggested, upon the ground that a certain portion of the charge was in fact excepted to, and that it has been omitted from the bill of exceptions by a clerical error, a *certiorari* will be awarded to supply the defect.⁵ But after argument in the appellate court, a *certiorari* will not be granted, for the purpose of bringing up material evidence omitted in the bill of excep-

¹ *Stimpson v. West Chester Railroad Co.*, 3 Howard, 553, 555; *United States v. Morgan*, 11 Howard, 154, 158.

² *Vasse v. Smith*, 6 Cranch, 233, *note*.

³ *Zeller's Lessee v. Eckert*, 4 Howard, 289, 297.

⁴ *United States v. Morgan*, 11 Howard, 154.

⁵ *Stimpson v. West Chester Railroad*, 3 Howard, 553.

tions, which might have influenced the judgment of the appellate court.¹

§ 383. In presenting the rulings excepted to, care must be taken to state the ruling or instruction specifically, and to follow it by an exception pointed to the precise ruling or instruction of which it is intended to complain. The practice of setting out in the record the whole charge, and excepting to it generally, has been pointedly rebuked on several occasions, and has led to a rule which explicitly prohibits it.² This rule is, that "the judges of the circuit and district courts do not allow any bill of exceptions, which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But that the party excepting be required to state distinctly the several matters of law in such charge to which he excepts; and that such matters of law, and those only, be inserted in the bill of exceptions, and allowed by the court."³

§ 384. The certificate of the circuit court, that a bill of exceptions was duly taken at the trial, is sufficient to cure a clerical error by which the bill was dated before the commencement of the suit.⁴ A material and incurable defect in the pleadings and verdict, presented in the record, may be noticed by the Supreme Court, although not noticed in the bill of exceptions, nor suggested by counsel in the argument.⁵

§ 385. With regard to the return-day and entry of a writ of error, it is to be observed, that the Judiciary Act makes no provision respecting the time at which the writ shall be returned, but merely provides that the judgment complained

¹ *Gayler v. Wilder*, 10 Howard, 509.

² *Carver v. Jackson*, 4 Peters, 80; *Ex parte Crane*, 5 Peters, 198.

³ Rule 38 (January Term, 1852).

⁴ *United States v. Wilkinson*, 12 Howard, 246.

⁵ *Garland v. Davis*, 4 Howard, 131.

of may be re-examined, or reversed, or affirmed in the Supreme Court, "the adverse party having at least thirty days' notice." This notice relates to the time of returning the writ; so that if the judgment is rendered more than thirty days before the commencement of a term of the Supreme Court, the writ may be made returnable on the first day of that term, and it will stand for trial in the regular order of the docket, if entered within the first six days of the term. But if the judgment was rendered less than thirty days before the commencement of the term, the writ of error may still be made returnable to the term next following the date of the writ; and if the cause is docketed, and the record filed in the Supreme Court within the first thirty days of the term, the cause will stand for argument at the term.¹

¹ Rule No. 63 (May 2, 1854). "First. In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree, rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause, and file the record thereof with the clerk of this court, within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause, and file the record thereof with the clerk of this court, within the first thirty days of the term; and, if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause and certifying that such writ of error or appeal has been duly sued out and allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record, after the same shall have been docketed and dismissed under the rule, unless by order of the court or the consent of the opposite party.

"Second. But the defendant in error or appellee may, at his option, docket the case, and file a copy of the record with a clerk of this court; and if the case is docketed, and a copy of the record filed with the clerk of this court, by either party, within the periods of time above-limited and described by this rule, the case shall stand for argument at the term.

"Third. In all cases where the period of thirty days is mentioned in this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Washington, New Mexico, and Utah."

§ 386. But if the plaintiff in error or appellant, do not enter the cause and file the record, provision is made by the rules of court, by which the writ of error or appeal may be docketed and dismissed, or docketed and argued, by the opposite party. Under the forty-third rule, such provision was made only with reference to cases where the judgment or decree in the court below was rendered thirty days before the commencement of the term of the Supreme Court.¹ In such cases, the forty-third rule required the plaintiff in error or appellant to docket the cause and file the record within the first six days of the term; and on his failure so to do, it gave the defendant in error or appellee the option to docket the cause and file the record for argument, or to docket the cause and have the writ of error or appeal dismissed. But by the sixty-second rule, the same provision is extended to cases where the judgment or decree in the court below was rendered less than thirty days before the commencement of the term of the Supreme Court; in which it is made the duty of the plaintiff in error or appellant to docket the cause and file the record within the first thirty days of the term; and on his failure so to do; the option is given to the defendant in error or appellee to docket the cause and file the record, for argument, or to docket the cause and have the writ of error or appeal dismissed.²

§ 387. With regard to the proceeding of docketing and dismissing a cause, it is to be observed that both the forty-third and sixty-third rules require that the party making the motion for this purpose, should produce "a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal has been duly sued out or allowed." The character and contents of this certificate should be carefully attended to. In the first place, it must set forth

¹ *United States v. Boisdoré's Heirs*, 7 Howard, 658.

² See the 63d Rule, ante, p. 515, note.

an accurate titling of the case, in which the names of all the parties on both sides must be set out, and not implied under the designation of "another," or "others."¹ In the

¹ *Holliday v. Batson*, 4 Howard, 645; *Smith v. Clark*, 12 Howard, 21. In this last case, Mr. Chief Justice Taney, delivering the judgment of the court, said: "The certificate of the clerk states, that in the Circuit Court of Massachusetts, in a cause depending in that court, in which Francis O. J. Smith was complainant in equity, and Joseph W. Clark, and others were respondents, a final decree in that court was made on the 17th of October, 1850, in favor of the said Joseph W. Clark, and others, respondents, from which the said Francis O. J. Smith appealed on the same day; and, on the 30th of October, filed his appeal bond with sureties, whereby execution on the decree was suspended.

"The certificate conforms to the rule in all respects but one, and that is in the statement of the parties. The respondents are stated to be Joseph W. Clark, *and others*, from which, as well as from the statement in the motion, it appears that there were other respondent parties to the suit, who are not named in the certificate.

"The forty-third rule provides, that where the party against whom a judgment or decree is rendered, fails to file the record, and docket the case within the time limited by the rule, the other party may docket the case, and file a copy of the record with the clerk, in which case it shall stand for argument at the term; or he may, at his election, have the case docketed and dismissed, upon producing a certificate from the clerk stating the cause, and certifying that such a writ of error or appeal had been duly sued out and allowed.

"Now, where the unsuccessful party brings a writ of error, all the parties to it must be named in the writ; and the name of one or more of them, '*and others*,' is not a sufficient description to bring those not named before the court. It was so decided in *Deneale and Others v. Stump's Executors*, 8 Pet. 526. And the same principle was applied to a writ of error docketed under the forty-third rule, in the case of *Holyday et al. v. Batson et al.*, 4 How. 645. And the reason for requiring all the parties, whose interests are to be affected by the judgment, to be named in the writ of error, applies with equal force to the case of an appeal from a decree.

"Where the party, in proceeding under the forty-third rule, elects to file the record and try the cause, the record must certainly be as full and complete as the one which would be required from the opposing party. It must name all the persons which the writ of error or appeal is intended to bring before the court; otherwise there could be no judgment or decree for or against them.

"And upon the same ground, the same thing must be done when the

next place, in order to show the right, afforded by the rule, of having the cause docketed and dismissed, it must appear that the plaintiff in error, or appellant, has not entered the cause within the time required by the rule; and hence the certificate must state not only the *term* at which the judgment or decree was rendered, but the *day* also.¹

case is docketed, in order to obtain a judgment of dismissal. The proceeding is in the nature of a writ of error or appeal, in which the party, in whose favor the judgment or decree was rendered, is allowed to bring the case before this court, in order to prevent unnecessary delay. And all the parties to the judgment or decree, whose interests are to be affected by docketing and dismissing the suit, are regarded as in court, for the purpose of being parties to the judgment of dismissal. Nor could the circuit court regularly issue an execution for or against a person not named; as it would not appear that he had been a party to the proceeding here, or that there had been a judgment of dismissal for or against him.

"The rule of which we are speaking was framed upon this principle. It requires that the certificate of the clerk should 'state the cause,' and this is not done unless the parties to it are named.

"A departure from the rule might lead to very loose practice, and perhaps to abuses. We think it more safe to adhere to the established practice in this respect, and have used this occasion to state it the more fully, in order that the members of the bar and the clerks of the court may in future avoid mistake."

¹ *Rhodes v. Ship Galveston*, 10 Howard, 144. Taney, Chief Justice: "The motion is made in behalf of the respondent and claimants, under the forty-third rule of this court; and, in support of the motion, they produce the certificate under seal of the clerk of the district court, stating that at the April term, 1850, a final decree was rendered in the above-mentioned case in favor of the respondents and claimants; and that the libellant prayed and obtained an appeal to this court. The certificate does not state on what day the decree was made.

"The rule referred to entitles a party, in a case like the present, to have it docketed and dismissed, where the decree was rendered thirty days before the commencement of the term of this court, unless the appellant shall docket the case, and file the record within the first six days of the term. The record has not yet been filed, and the case docketed by the appellant. But, in order to entitle the appellees to docket and dismiss, they must show, by the certificate of the clerk, that the decree was rendered thirty days before the present term. The certificate produced states only the term of the district court at which it was ren-

§ 388. It has been held, however, that the forty-third rule has been in substance complied with, when, instead of a certificate of the clerk, the original writ of error and citation, or certified copies thereof, have been produced: upon the ground that the rule makes the certificate but *prima facie* evidence of the issuing and allowing of the writ of error, whereas the production of the writ of error, with the citation, is the highest evidence of the fact that the writ of error has been duly sued out and allowed.¹

§ 389. The judgment of dismissal, under the rule, is a judgment *nisi*, and may be stricken out at any time during the term upon motion, unless it appears that the omission to file the record and docket the case at an earlier period of the court, has been injurious to the interests of the defendant in error. The motion to reinstate the cause addresses itself to the sound discretion of the court.² The rule has never been applied to cases where the cause has been actually placed on the docket, before the defendant in error moves to docket and dismiss; and if the plaintiff in error moves to docket the cause at the same time when the defendant in error moves to dismiss it, the former motion will prevail.³

§ 390. It has already been stated, that on a writ of error the points of law presented by the bill of exceptions are

dered, and not the day. And it often happens that the term of a court continues by adjournments from time to time for several months. For aught that appears in this certificate, the April term, 1850, of the district court may have continued until the meeting of this court, and we are not aware of any case that has been docketed and dismissed under this rule, unless the day of the judgment or decree was stated in the certificate. And as we have no evidence before us to show how long the term of the district court continued, or on what day this decree was rendered, the motion to docket and dismiss is overruled."

¹ *Amis v. Pearle*, 15 Peters, 211.

² *Gwin v. Breadlove*, 15 Peters, 284.

³ *Owings v. Tiernan*, 10 Peters, 24.

alone open for re-examination in the appellate court: so that the instructions of the presiding judge to the jury, on matters of fact, or the opinions he may express, constitute no grounds of error. It is competent to the court to give their opinion on the evidence to the jury, being careful to distinguish between matters of law, and matters of opinion in regard to the facts. When a matter of law is given by the court to the jury, it is conclusive; but a mere matter of opinion as to the facts, is to have only such weight given to it by the jury as they may think it is entitled to.¹

§ 391. It has been held, in relation to the record of a cause tried in a state court, and brought to the Supreme Court of the United States, by writ of error, that the report of the judge who tried the cause, which contains a statement of the facts, is not to be considered as a part of the record. It is not like a special verdict, or a statement of facts agreed of record, upon which the court is to pronounce its judgment. The judgment being rendered upon a general verdict, the report is mere matter *in pais*, to regulate the discretion of the court as to the propriety of granting relief, or sustaining a motion for a new trial. Inasmuch, therefore, as the twenty-fifth section of the Judiciary Act provides, in cases brought by writ of error from the state courts, that "no other error shall be assigned or regarded, as a ground of reversal in any such case, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity, or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute;" if there is nothing in the record but the judge's report of the evidence, it cannot appear that any error has been assigned of which the Supreme Court of the United States can take cognizance.²

¹ *Games v. Stiles*, 14 Peters, 322, 327; *Carver v. Jackson*, 4 Peters, 1, 80; *Garrand v. Lessee of Reynolds*, 4 Howard, 123; *Evans v. Eaton*, 7 Wheaton, 426.

² *Inglee v. Coolidge*, 2 Wheaton, 363.

§ 392. With regard to cases arising in the circuit courts, or in a district court having the powers of a circuit court, it has been fully settled that the Supreme Court of the United States can take cognizance of a case brought before it by writ of error, on which is returned a record containing an agreement of facts signed by the parties, and submitting the case to the court for the decision of the questions of law arising upon those facts.¹ And it is equally well settled that the evidence cannot be brought before the Supreme Court, by writ of error, for the purpose of having that court find facts, or of revising the finding of facts in the court below. In *Parsons v. Bedford*, it was held that a refusal of the Circuit Court in Louisiana to record the evidence, in order to have the facts revised in the Supreme Court by writ of error, was not a ground for a writ of error;² and in a more recent case it was held that an agreement that the evidence in the cause shall be considered as a statement of facts, subject to all legal objections, no objections being stated, was not a sufficient ground for a writ of error on which a revision of the legal questions arising on those facts can be had in the Supreme Court.³

¹ *United States v. Eliason*, 16 Peters, 291; *Stimpson v. Baltimore and Susquehanna Railroad Company*, 10 Howard, 329.

² 3 Peters, 433, 445.

³ *Minor v. Tillotson*, 2 Howard, 392. In this case, Mr. Justice M'Lean, delivering the judgment of the court, said:—"This case is brought here by a writ of error to the Circuit Court for the Eastern District of Louisiana.

"The action was commenced in the Circuit Court to recover possession of certain tracts of land specified in the petition, and for damages, &c.

"The defendant set up a title to the premises, and pleaded prescription under the various laws of Louisiana.

"This cause was before this court at January Term, 1833, on a writ of error, and was reversed and sent down for farther proceedings. In the court below, the death of the plaintiff was suggested, and a supplemental petition was filed, making his heirs and representatives parties to the suit. The pleadings were amended, and a jury being called and sworn, evidence was heard by them, and certain exceptions taken to its admissibility by the defendant. But afterwards, by consent of parties,

§ 393. In addition to the record, it is provided, by a rule of the Supreme Court, that "whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit

the jury, before they rendered their verdict, were discharged. The cause was then submitted to the court, under an agreement between the counsel that the documents filed in the cause, the plans, and written depositions, contain all evidence and exhibits on which this cause was tried by the court; the whole was read, subject to all legal exceptions except as to the form of taking the verbal testimony; and all other objections to the testimony, accounts, and plans, are to be argued as though the bills of exceptions were drawn out in form, signed and filed. The agreement is made for a statement of the facts in the case.

"A large mass of evidence was received from both parties, consisting of concessions and grants under the Spanish government, intermediate conveyances, documents showing proceedings in regard to the title under the laws of the United States, and parol testimony, involving a great variety of facts, on a consideration of all of which a judgment was rendered by the Circuit Court for the defendant.

"From the record, it is impossible for this court to say on what grounds of law or fact the Circuit Court gave judgment. No point as to the admissibility or effect of the evidence was raised on the record by the plaintiff in error in the Circuit Court. It seems to have been supposed that the above agreement of the counsel that the evidence in the cause should be considered as a statement of facts, subject to all legal objections, though no objections were stated, was sufficient ground for a writ of error on which a revision of the legal question in the case might be made in this court.

"In this view, the writ of error must be considered as bringing all the facts before this court as they stood before the Circuit Court. And this court, exercising a revisory jurisdiction, would be required to try the cause on its merits. This is never done on a writ of error, which issues according to the course of the common law. Under the Louisiana system a different practice may prevail. But we had supposed that, since the decision of the case of *Parsons v. Bedford et al.*, 3 Peters, 445, there could be no misapprehension in regard to the proceedings of this court on a writ of error. In that case, the court say, 'It was competent for the original defendant to have raised any points of law growing out of the evidence at the trial, by a proper application to the court; and to have brought any error of the court in its instruction or refusal, by a bill of exceptions, before this court for revision. Nothing of this kind was done or proposed. No bill of exceptions was tendered to the court, and no points of law are brought under review.' And the court go on to consider the effect of the Act of 1824, in regard to the Louisiana prac-

court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in the Supreme Court, upon appeal, such presiding judge may make such rule or order for the safe keeping, transportation, and return, of such original papers, as to him may seem proper; and this Court will receive and consider such original papers in connexion with the transcript of the proceedings.”¹

§ 394. The judgment to be rendered in the Supreme Court is the next topic to be considered. If the judges of

tice, and hold that that law does not change the exercise of the appellate power of this court.

“The case referred to had been tried by a jury; but, in regard to the revisory power of this court on a writ of error, there is no material difference between that case and the one under consideration. In both cases the facts were upon the record, and this court were called upon to determine the questions of law arising upon the facts.

“In the case of *Parsons*, the court do say, ‘that, if the evidence were before them, it would not be competent for the court to reverse the judgment for any error in the verdict of the jury.’ And they say the refusal of the court to direct the evidence to be entered on the record, as required under the Louisiana practice, was not matter of error.

“Whatever opinion, therefore, may have been entertained in regard to the effect of the Act of 1824, on the practice of the Circuit Court of the United States in Louisiana before the above decision, after it there would seem to be no ground for doubt. The practice of the Circuit Court in Louisiana, since the above case was decided, has conformed to the rule laid down in that case. But in the present cause there is no statement of agreed facts. If the case be revised on a writ of error, the evidence on both sides must be considered and weighed by the court, as a jury would consider and weigh it; and after adjusting the balance, the principles of law, not as they were presented to the Circuit Court, but as they may arise on the evidence, must be determined. This is not the province of a court of error, but of a court of chancery on an appeal from the decree of an inferior court. On such a review, not only the competency of the evidence must be decided, but also the credibility of the witnesses.

“The case under consideration was a proceeding at law; and, as the legal points have not been raised by a bill of exceptions, in the Circuit Court, it is not a case for revision in this court.”

See also *Shankland v. The Corporation of Washington*, 5 Peters, 389.

¹ Rule 26, Feb. Term, 1817.

the Supreme Court are divided in opinion, the judgment of the court below is affirmed :¹ and whether that judgment be affirmed by a divided court, or by the whole court, the judgment of the Supreme Court is conclusive upon the rights of the parties, and cannot be again opened upon a second writ of error.² On a second writ of error, after a mandate from the Supreme Court, nothing is brought up but the proceedings subsequent to the mandate.³

§ 395. The twenty-third section of the Judiciary Act provides, that when a judgment or decree is affirmed in the Supreme Court, that court is to award the respondent in error just damages for his delay, and single or double costs, at their discretion. In pursuance of the discretionary power conferred by this statute, the Supreme Court have, from time to time, adopted rules for the purpose of fixing the rate of damages to be allowed in addition to the amount found to be due by the judgment or decree of the court below. Recently, these rules have been revised, and the following, being the sixty-second rule, is now in operation. "In cases where a writ of error is prosecuted to the Supreme Court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest, in the courts of the state where such judgment is rendered. The same rule shall be applied to decrees for the payment of money in cases in chancery, unless otherwise ordered by this court. This rule to take effect on the first day of December Term, 1852."⁴ The operation of the former rules, and of the present rule has been explained by the court, as follows : "The Act of 1842 does not embrace cases in equity ; nor does it extend

¹ *The Antelope*, 19 Wheaton, 66 ; *Etting v. The Bank of the U. S.*, 11 Wheaton, 50.

² *Washington Bridge Co. v. Stewart*, 3 Howard, 413.

³ *Ex parte Silbald v. The United States*, 12 Peters, 488, 491 ; *Washington Bridge Co. v. Stewart*, 3 Howard, 413.

⁴ Rule 62 (December Term, 1851).

to either judgments or decrees in this court. It is confined, in plain terms, to judgments at law, in the circuit and district courts. It places the judgments of these courts, in respect to interest, upon the same footing with the judgment of the state courts. And where, by the law of the state, the judgment of a court carries a certain interest until paid, the former rule and the same rate of interest is to be allowed in the circuit and district courts of the United States. And the marshal is directed to levy it on process of execution, wherever it can be so levied on a judgment in the state court. In such cases the judgment bears interest by force of the law, although, upon the face of it, it may not purport to carry interest. Upon common law principles, a judgment does not carry interest. It is true that damages may be recovered for the detention of the debt, in an action on the judgment. But, previous to the Act of 1842, neither interest nor damages, for the detention of the debt, could have been levied under process of execution, upon the judgment of a circuit or district court of the United States.

“But the Act of 1842 does not speak of interest or damages upon the judgment of this court, nor does it repeal the twenty-third section of the Act of 1789. This section provides, that when a judgment or decree is affirmed here, this court is directed to adjudge or decree to the respondent in error just damages for his delay, and single or double costs, at their discretion. Under this law, there is no distinction made between cases in equity and at law. In either of them, the damages to be allowed, in addition to the amount found to be due by the judgment or decree of the court below, is confined to the judicial discretion of this court. And the seventeenth, eighteenth, and twentieth rules were adopted in pursuance of this power.

“These rules have been in force, and acted on by the court, since 1807, when the twentieth rule was adopted, until the new rule upon this subject was made at the close of the last term. And the change then made was not occasioned by any supposed repugnancy between them and the

Act of 1842. But, because the court deemed it just to place the judgments in this court upon the same footing with the judgments in the circuit and district courts; and that suitors in the courts of the United States should stand on the same ground with suitors in the state courts in its appellate, as well as in its inferior tribunals. In adopting the new rule, this court exercised the same power which it had exercised in adopting the former rules, that is, the discretionary power conferred by the Act of 1789, as hereinbefore mentioned.

“The seventeenth rule provides, that when a case appears to be brought merely for delay, damages shall be awarded at the rate of ten per cent. on the amount of the judgment; and, by the eighteenth rule, the damages are to be at the rate of six per cent., when it appears that there is a real controversy.

“These two rules were passed in 1803. And as some difficulty arose as to the time for which these damages were to be computed, the twenty-third rule was afterwards (1807) adopted, and provides, that the damages allowed by the two former rules shall be calculated to the day of the affirmance of the judgment in this court.

“The question as to the operation of the Act of 1842, upon the eighteenth and twentieth rules, was brought to the consideration of the court at the last term, in the case of *Mitchell v. Harmony*. The judgment brought up by the writ of error was rendered in the Circuit Court of New York, and was affirmed in this court. The sum recovered was large, and the interest, even for a short time, was therefore important. And the counsel for Harmony, the defendant in error, moved the court to allow him the New York interest of seven per cent. upon the amount of the judgment, and that the interest should run until the judgment was paid. But as the rules above mentioned were still in force, that court held that he was entitled only to six per cent., to be calculated from the date of the judgment in the circuit court, to the day of affirmance here.

“The case now before us was decided in the early part of the last term, before the case of *Mitchell v. Harmony*, and, consequently, falls within the operation of the same rules, and damages upon the affirmance of the decree must be calculated in like manner.

“Indeed, in the New York case, the claim for interest stood on stronger ground than in the present one, for that was an action at law. The Act of 1842, therefore, applied to the judgment in the circuit court, and it would have carried the state interest until paid, if it had not been brought here by writ of error. But this is a decree in equity, and not embraced in the Act of 1842; and, according to the settled chancery practice, no interest or damage could have been levied under process of execution, upon the amount ascertained to be due, and decreed to be paid, if there had been no appeal: 2 Ves. 157, 168, n. 1, Sumn. Ed.; 2 Dan. Chan. Plead. and Prac. 1442, 1437, 1438. Nor could any damage or interest have been given on its affirmance here, but for the discretionary power vested in this court by the Act of 1789. That discretion, as we have already said, extends to decrees in equity, as well as judgments at law. And the rules have always been applied to both, unless otherwise specially ordered.

“It follows, from what we have said, that the appellees, upon the affirmance of the decree, were entitled to damages at the rate of six per cent., to be calculated from the date of the decree to the date of the affirmance, and to no further interest or damages.”¹

§ 396. In cases, therefore, which fall within the operation of the 62d rule, interest or damages are to be allowed from the date of the judgment below, until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where the judgment was rendered.

§ 397. The Supreme Court issues no executions, except

¹ *Perkins v. Tourniquet*, 14 Howard, 328.

where a state court has once refused to execute their mandate. In such a case, the Supreme Court will award execution.¹ In all other cases, the mandate of the Supreme Court directs the court below to issue execution, when the judgment is affirmed.²

§ 398. The appellate court cannot, upon a writ of error, examine the propriety of the allowance or refusal of an amendment by the court below, or, indeed, any motion addressed to its sound discretion.³ The court will not review or revise the judgment of an inferior court, unless it appears from the record, either in direct terms, or by necessary intendment, that the point which is controverted was, in fact, brought to the notice of the court below, and decided by it. It is not sufficient that the question was involved in the case, and might have been raised and decided.⁴

§ 399. The practice of the Supreme Court, in cases brought before it by a writ of error, upon defective pleadings, is not to direct an amendment or a repleader, the allowance of the latter having fallen very much into disuse in modern times; but to reverse the judgment and remand the cause to the court below for further proceedings there.⁵ Where a plea or verdict is radically defective, the court may, in some cases, notwithstanding the verdict, proceed to render a judgment in favor of the party whose pleadings are right. But this will not be done unless there is something in the record to show that a final judgment ought to be rendered on the merits.⁶

¹ *Martin v. Hunter*, 1 Wheaton, 304.

² Judiciary Act.

³ *Wright et als. v. Lessee of Hollingsworth et als.* 1 Peters, 165; *Matheson's Administrator v. Grant's Administrator*, 2 Howard, 263; *The United States v. Buford*, 3 Peters, 12; *Walden v. Craig*, 9 Wheaton, 576; *Chime v. Reinecker*, 11 Wheaton, 280; *Resler v. Shehee*, 1 Cranch, 110.

⁴ *Coons et al. v. Gallagher*, 15 Peters, 18, citing *Crowell v. Randall*, 10 Peters, 398.

⁵ *Garland v. Davis*, 4 Howard, 131.

⁶ *Ibid.*

§ 400. Where the judgment of a state court is brought before the Supreme Court for revision, under the twenty-fifth section of the Judiciary Act, the judgment of the latter court must be confined to the error alleged in the decision.¹ Where the judgment below was upon a special verdict, or a case agreed in lieu of a special verdict, and it is reversed in the appellate court, that court will proceed to give judgment, and merely direct the court below to enter such judgment.² But where a judgment upon a verdict for the plaintiff is reversed, upon a writ of error founded upon a bill of exceptions to the opinion of the court below, the direction to such court is to award a *venire de novo*.³ So, where a judgment upon a special verdict is reversed, upon the ground that such special verdict is too defective to enable the court to give judgment upon the merits, the cause will be remanded, with directions to award a *venire de novo*.⁴

§ 401. The court having reversed the judgment of the court below, on a writ of error, founded upon a bill of exceptions taken at the trial, refused to give effect to an agreement of counsel in the court below, transcribed on the record, that, in the event of a reversal, the Supreme Court should enter up a judgment for one of several specified sums, according as that court might be of opinion that the plaintiff below was entitled to recover one or other of such sums. This agreement was considered as forming no part of the record; and the court were also of opinion, that to act upon it would be to exercise a power too nearly approaching the province of a jury, and therefore directed a *venire de novo* to be issued.⁵ The Supreme Court having reversed a judgment of the Court of Appeals of Maryland, reversing

¹ Lessee of Pollard's Heirs *v.* Kibbe, 14 Peters, 353.

² Hudson et als. *v.* Smith, 6 Cranch, 285.

³ *Ib.*

⁴ The Chesapeake Insurance Co. *v.* Stark, 6 Cranch, 268; Livingston et al. *v.* The Maryland Insurance Co., 6 Cranch, 274.

⁵ Lanusse *v.* Barker, 3 Wheaton, 101; see Shankland *v.* The Corporation of Washington, 5 Peters, 389.

a judgment of the General Court of Maryland, directed the mandate for execution to issue to the General Court.¹ Where a judgment over which the Supreme Court has jurisdiction, is brought before it for revision by a writ of error, it will not, upon a motion to dismiss the writ of error, examine whether the record contains any bill of exceptions, or any statement of facts upon which a question of law could arise for review.²

§ 402. Where the court below instructed the jury to give damages for the hire of a steamboat, from a certain time to a day which, it appears from the record, was posterior to the institution of the suit, the judgment should be reversed.³

§ 403. The laws of Louisiana authorizing a summary judgment upon mere motion against the security in an appeal bond, without the intervention of a jury, such a judgment may be rendered in the District Court of Louisiana under the Act of Congress of 1824.⁴

§ 404. Where there is a substantial defect in the appeal, or writ of error, the objection may be taken at any time before the judgment, on the ground of a want of jurisdiction.⁵

§ 405. The mandate of the Supreme Court to the circuit court must be its guide in executing the judgment or decree on which it issued. The mandate is the judgment of the Supreme Court transmitted to the circuit court; and where the direction contained in it is precise and unambiguous, it is the duty of the circuit court to carry it into execution,

¹ *Clark v. Harwood*, 3 Dallas, 342; 1 Cond. 157.

² *Minor et ux. v. Tillotson*, 1 Howard, 287.

³ *Bradley v. The Steam-packet Co.*, 9 Peters, 107.

⁴ *Warrent v. Ballou*, 9 Peters, 156.

⁵ *The Heirs of Wilson v. The Life and Fire Insurance Co. of New York*, 12 Peters, 140.

and not to look elsewhere for authority to change its meaning. But when the circuit courts are referred to testimony to ascertain the amount to be decreed, and are authorized to take more evidence on the point, it may sometimes happen that there will be some uncertainty and ambiguity in the mandate; and in such a case the court below have, unquestionably, the right to resort to the opinion of the Supreme Court, delivered at the time of the decree, in order to assist them in expounding it.¹ The mandate of the Supreme Court is to be interpreted according to its subject-matter, and is in no manner to work injustice.² The meaning of the mandate may be ascertained from the instrument itself, but the reasons which induced the court to make it, are to be found in the evidence contained in the original record. The proceedings in the original suit are always before the court, so far as to determine any new points between the parties.³ A judgment of the Court of Errors of New York had been brought before the Supreme Court of the United States, and reversed, on the ground that the defendant being Consul-General of Saxony, could not be sued in the Supreme Court. When the mandate of the Supreme Court was filed in the Court of Errors of New York, that court declared, that the person named was exempt from being sued in a state court; but added, that the fact of his character did not appear upon the record of the proceedings of the court below (the Supreme Court of New York), and that its own power did not extend to the reversal of any judgment of that court, for an error of fact not apparent upon the face of the record; and for these reasons ordered the writ of error to the court below to be quashed. This judgment being brought before the Supreme Court of the United States by a writ of error was affirmed.⁴

¹ West et als. v. Brashear, 14 Peters, 51.

² Story v. Livingston, 13 Peters, 359.

³ Mitchell et als. v. The United States, 15 Peters, 52, citing *Ex parte Sibbald*, 12 Peters, 493, and *The Santa Maria*, 10 Wheaton, 431.

⁴ Davis v. Packard et als. 8 Peters, 312.

§ 406. Where the original judgment is reversed, the reversal of a dependent judgment on a forthcoming bond follows, as a matter of course. But a difficulty may arise in connecting with the original reversed judgment that which is asserted to be dependent upon it. A certiorari upon a suggestion of diminution would not answer the purpose, as the proceedings in the original suit form no part of those in the subsequent suit, the only foundations of which are the bond and notice. Nor would it be regular to receive as evidence of the dependency of the latter upon the former judgment, the certificate of the clerk of the circuit court. The court thought it best to direct a special writ to be framed, applicable to cases of this nature, to be directed to the clerk of the court in which the judgments were rendered, to certify under the seal of the court the execution recited in the bond on which the second judgment was rendered.¹

¹ *Bartit v. Petit & Bayard*, 7 Cranch, 288; 2 Cond. 494.

CHAPTER VII.

PRACTICE OF THE SUPREME COURT IN EQUITY AND
ADMIRALTY APPEALS.

§ 407. THE Act of March 3, 1803, ch. 93, § 2, having provided the process of appeal for the removal of equity and admiralty cases from the circuit courts to the Supreme Court, such cases cannot be removed by writ of error.¹ And whether the distinction between proceedings at law and proceedings in equity exists or not in the courts of a state, if the relief sought in the circuit court of the United States is a relief mainly appropriate to a chancery jurisdiction, the case must be carried to the Supreme Court by appeal, and not by writ of error.²

§ 408. As the Act of 1803, however, makes appeals in equity and admiralty "subject to the same rules, regulations, and restrictions, as are prescribed by law in cases of writs of error," by the Act of 1789, the time within which the appeal may be taken, in what instances it is to operate as a supersedeas, the citation to the adverse party, the security to be given by the appellant for prosecuting his suit, and the restrictions upon the appellate court as to reversals in certain enumerated cases, are to be the same as are provided by the latter statute for writs of error;³ except that where the appeal is prayed in open court at the same term when the decree

¹ The San Pedro, 2 Wheaton, 132.

² M'Collum v. Eager, 2 Howard, 61.

The San Pedro, 2 Wheaton, 132, 142.

appealed from is made, a citation is not necessary.¹ But if the appeal is prayed after the court has risen, the appellant must proceed in the same manner as in a writ of error.²

§ 409. The time within which an appeal may be taken being fixed, by the 22d section of the Judiciary Act, at the period of five years from the time of rendering or passing the decree, a second appeal, within that time, may be taken, where the first appeal has been dismissed for informality.³ If the appeal is taken and the bond given within ten days from the date of the decree, it will operate as a supersedeas; and if the final decree does not take effect until a day subsequent to its date, in consequence of the subsequent action of the court with regard to it, the ten days will begin to run when that subsequent action is finally terminated. Thus, where a final decree was rendered on the 10th of May, 1843, and on the 26th of the same month the defendants filed a petition to have the decree opened for certain purposes, and the court took cognizance of the petition, and on the 9th of June refused it, and thereupon the defendants took an appeal from this refusal as well as from the final decree, and gave bond on the 15th of June, and the appeal was then allowed by the court, it was held, that the appeal operated as a supersedeas or stay of execution on the decree, being within ten days from the day when the decree, which had been suspended, took effect.⁴

§ 410. With regard to the parties by whom an appeal is to be taken, the rule is, that where there are various parties, all of them who are affected by a joint decree should be joined in the appeal from that decree; and if any of them refuse or decline upon notice and process (in the nature of a

¹ Ibid. *Reiley v. Lamar*, 2 Cranch, 349; *Brockett v. Brockett*, 2 Howard, 238.

² *Yeaton v. Lenox*, 7 Peters, 220. ³ *Yeaton v. Lenox*, 8 Peters, 123.

⁴ *Brockett v. Brockett*, 2 Howard, 238.

summons and severance in a writ of error) to be issued in the court below, to become parties to the appeal, then the other parties will be at liberty to prosecute the appeal for themselves and upon their own account, and the appeal as to the others may be pronounced deserted, and the decree of the court below as to them be proceeded in and executed.¹ But if the decree is several, the parties may have their several appeals, and proceed alone.² The same rules, in fact, are applicable as in writs of error.³

§ 411. In case, however, of a joint decree against several parties, although all of them may have appealed, it is not necessary that all should sign the appeal bond. It is sufficient if the bond is approved by the court below, as satisfactory and complete security, by whomsoever it may be executed.⁴

§ 412. The want of a proper service of the citation may be shown in the Supreme Court, after judgment has been rendered upon an appeal and a mandate to the circuit court has been issued. If it appears that the appeal was irregularly before the Supreme Court, its decree will be reversed and the mandate revoked.⁵

§ 413. The record brought up by the appeal, whether in equity or admiralty, must contain "a transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause;"⁶ and if parol testimony was heard in the court below, such testimony must be reduced to writing,

¹ *Todd v. Daniel*, 16 Peters, 521.

² *Owings v. Kincannon*, 7 Peters, 399.

³ *Ibid.* *Coxe and Dick v. The United States*, 6 Peters, 172.

⁴ *Brockett v. Brockett*, 2 Howard, 238. An objection to the appeal bond, if well founded, ought to be taken by way of preliminary motion to dismiss the appeal for irregularity. *Mandeville v. Riggs*, 2 Peters, 482.

⁵ *Ex parte Crenshaw*, 15 Peters, 119.

⁶ Act March 3, 1803, § 2.

and appear in the record.¹ A statement of facts is not sufficient.²

§ 414. An appeal brings up all the matters which were decided in the circuit court to the prejudice of the appellant, including a prior decree of that court from which an

¹ *Coun v. Penn*, 5 Wheaton, 424. In this case, Mr. Ch. Justice Marshall, delivering the judgment of the court, said: "Without going into the merits of the case, the counsel for the plaintiffs contend that the decree ought to be reversed, because it appears to have been pronounced in part on parol testimony, which has not been introduced into the record, and because the decree was made when the parties interested were not all before the court.

"The laws of the United States have always proceeded on the supposition, that in revising decrees in Chancery, the facts, as well as the law, should be laid before this court. The Judiciary Act, which directs that the mode of proof shall be by oral testimony, and that witnesses shall be examined in open court, also directs that a statement of facts shall be placed on the record. The Act of 1802 leaves it to the discretion of the courts in those states where testimony in Chancery is taken by depositions, to order, on the request of either party, the testimony of the witnesses to be taken by depositions.

"The Act of 1803 repeals those parts of the Judiciary Act which authorize a writ of error, and a statement of facts in Chancery cases; allows an appeal from the decrees of a circuit court sitting in Chancery; and directs that a copy of the bill, answer, depositions, and all other proceedings, of what kind soever, in the cause, shall be transmitted to this court, and that no new evidence shall be heard.

"Previous to this Act, the facts were brought before this court by the statement of the judge. The depositions are substituted for that statement; and it would seem, since this court must judge of the fact, as well as the law, that all the testimony which was before the circuit court ought to be laid before this court. Yet the section which directs that witnesses shall be examined in open court, is not, in terms, repealed.

"The court has felt considerable doubts on this subject, but thinks it the safe course to require that all the testimony on which the judge founds his opinion, should, in cases within the jurisdiction of this court, appear in the record. The parties may certainly waive testimony by consent, but if this consent does not appear, it cannot be presumed; and where it is shown on the record that witnesses were examined in open court, this court cannot say how much the opinion of the circuit court was influenced, and ought to have been influenced, by their testimony."

² *The Mayor, &c., of New Orleans v. The United States*, 5 Peters, 448.

appeal was taken, but which appeal was dismissed under the rules of the Supreme Court.¹

§ 415. An equity suit, where an appeal has been taken from the circuit court to the Supreme Court, but not prosecuted, will be dismissed upon producing a certificate from the court below, that the appeal has been taken and not prosecuted.²

§ 416. An objection to the competency of a witness, on the ground of interest, cannot be taken in the Supreme Court on a hearing on the appeal, where the witness had been admitted without objection in the district and circuit court.³

§ 417. Where the record from the court below contained the whole proceedings in the case, and exhibited all the matters either party required for a final disposition of the case, and the counsel for both the appellant and the appellees were willing to submit, upon argument, the whole case to the final decision of the court, but it appeared that the Circuit Court of Ohio had not decided any question but that which had been raised upon the jurisdiction of the court; the counsel were directed by the Supreme Court to argue the point of jurisdiction only.⁴

§ 418. Where an appeal has been dismissed, the appellant having omitted to file a transcript of the record within the time required by the rule of court, an official certificate of the dismissal of the appeal may not be given by the clerk during the term. The appellant may file the transcript with the clerk during the term, and move to have the appeal reinstated. To allow such certificate would be to prejudice such a motion.⁵

¹ *Buckingham v. M'Lean*, 13 Howard, 150.

² *Randolph v. Barbour*, 6 Wheaton, 128; 5 Cond. Rep. 33.

³ *The Palmyra*, 12 Wheaton, 1; 6 Cond. Rep. 397.

⁴ *M'Donald v. Smalley et al.*, 1 Peters, 621.

⁵ *Bank of the United States et al. v. Swan*, 3 Peters, 68.

§ 419. An appeal was taken at the December Term, 1832, of the Circuit Court for the District of Columbia, to the January Term, 1833, of the Supreme Court; but the appeal was not entered to that term, but was entered at January Term, 1834. The case being called for argument, the defendant asked for a continuance, which was granted.¹

§ 420. The death of the appellee having been suggested, and the counsel for the executor of the appellee having offered to enter his appearance for the executor, the court sustained a motion to dismiss the cause, as no person appeared to prosecute the suit.²

§ 421. A defendant in appeal, using the copy of the record received from the circuit court, lodged by the appellant, cannot have the appeal docketed and dismissed, under the thirtieth rule of the court, on the ground that the appellant has failed to comply with the thirty-seventh rule, which requires a bond to be given to the clerk of the Supreme Court, before the case is docketed. He must, to sustain a motion to dismiss the cause, produce the certificate of the circuit court, stating the cause, and certifying that such an appeal has been duly sued out and allowed.³

§ 422. To permit, upon appeal to the Supreme Court from proceedings on its mandate, a suggestion of want of jurisdiction in the Supreme Court upon the first appeal, as a sufficient cause for re-examining the judgment there given, would certainly be a novelty in a court of equity. The Supreme Court has no power to review its decisions, either in a case at law, or in equity.⁴

¹ *Brown v. Swann*, 8 Peters, 435.

² *Hooke et al. v. Linton*, 10 Peters, 107.

³ *West v. Brashier*, 12 Peters, 101.

⁴ *Washington Bridge Company v. Stewart*, 3 Howard, 424.

CHAPTER VIII.

PRACTICE OF THE SUPREME COURT IN CASES CERTIFIED ON
DIVISION OF OPINION.

§ 423. WHERE a case is certified to the Supreme Court, upon a division of opinion of the judges below, and the points reserved upon which they were divided are too imperfectly stated to enable the Supreme Court to pronounce any opinion upon them, the Supreme Court will neither award a *venire facias de novo*, nor certify any opinion to the court below upon the points reserved, but will merely certify that they are too imperfectly stated.¹

§ 424. Where the point on which the judges of the circuit court divided in opinion was not certified, but the point of difference was to be ascertained from the whole record, the court refused to take jurisdiction of the case.²

§ 425. After a case had been, at the request of the plaintiff, certified from the Circuit Court of Maine, on a division of opinion between the judges of the court, the plaintiff filed in the circuit court a notice that he had discontinued the cause, and gave the defendant notice that, at the ensuing term of the Supreme Court, the cause would be then discontinued. On motion of the plaintiff, the court allowed the discontinuance.³

¹ Perkins v. Hart, 11 Wheaton, 237 ; 6 Cond. Rep. 287.

² D'Wolf v. Usher, 3 Peters, 269.

³ Veazie v. Wadleigh, 11 Peters, 55.

§ 426. Where the whole cause, and not a point or points in the cause, has been adjourned from the circuit court to the Supreme Court, the case will be remanded to the circuit court.¹

¹ *Saunders v. Gould*, 4 Peters, 392.

CHAPTER IX.

PRACTICE OF THE SUPREME COURT IN CASES OF ITS ORIGINAL JURISDICTION.

§ 427. SERVICE of process at common law or equity, in a suit against a state, is to be made upon the governor or chief magistrate, and the attorney-general of the state.¹

§ 428. The delivery of a copy of the subpoena, in an equity suit against a state, to the attorney-general, a copy being also left at the governor's house, and showing the original to the secretary of state, is a sufficient service of the process.²

§ 429. In a suit against a state, the service of process on the governor or chief executive magistrate, and on the attorney-general of the state, is a regular service of the process.³

§ 430. The subpoena issued on the filing of a bill, in which the State of New Jersey were complainants, and the State of New York were defendants, was served upon the Governor and Attorney-General of New York sixty days before the return-day, the day of the service and return inclusive. This being irregular, a second subpoena issued,

¹ Grayson *v.* The State of Virginia, 3 Dall. 320; 1 Cond. Rep. 141.

² Huger *v.* The State of South Carolina, 3 Dall. 339; 1 Cond. Rep. 144.

³ Chisholm's Ex'rs *v.* The State of Georgia, 2 Dall. 419; 2 Cond. Rep. 635.

which was served on the Governor of New York only, the Attorney-General being absent. There was no appearance by the State of New York. By the court:—This is not like the case of several defendants, where a service on one might be good, though not on another. Here the service prescribed by the rule is to be on the Governor, and on the Attorney-General. A service on one is not sufficient to entitle the court to proceed. Upon an application by the counsel for the State of New Jersey, that a day might be assigned to argue the question of the jurisdiction of the Supreme Court to proceed in the case, the court said they had no difficulty in assigning a day. It might be as well to give notice to the State of New York, as they might employ counsel in the interim. If, indeed, the argument should be merely *ex parte*, the court could not feel bound by its decision, if the State of New York desired to have the question again argued. A notice was given by the solicitors for the State of New Jersey to the Governor of the State of New York, dated the 12th of January, 1830, stating that a bill had been filed on the equity side of the Supreme Court, by the State of New Jersey, against the people of the State of New York, and that, on the 13th of February following, the court would be moved in the case for such order as the court might deem proper, &c. Afterwards, on the day appointed, no counsel having appeared for the State of New York, on the motion of the counsel for the State of New Jersey for a subpoena to be served on the Governor and Attorney-General of the State of New York, the court said: As no counsel appears to argue the motion on the part of the State of New York, and the precedent for granting it has been established, upon very grave and solemn argument; the court do not require an *ex parte* argument in favor of their authority to grant the subpoena, but will follow the precedent heretofore established. The State of New York will be at liberty to contest the proceeding at a future time in the course of the cause, if they shall choose so to do.¹

¹ *The State of New Jersey v. The State of New York*, 3 Peters, 461.

§ 431. After due service of the subpoena, the state which is complainant has a right to proceed *ex parte* in a suit against a state; and if, after the service of an order of court for the hearing of the case, there shall not be an appearance, the court will proceed to a final hearing. No final decree or judgment having been given in the Supreme Court against a state, the question of proceeding to a final decree is not conclusively settled in such a case.¹

§ 432. In a case depending between the States of Rhode Island and Massachusetts, the senior counsel appointed to argue the cause for the State of Rhode Island, by the legislature, was prevented, by unexpected and severe illness, attending the court; the court, on the application of the attorney-general of the state, ordered a continuance for the term.²

§ 433. The practice seems to be well settled that, in suits against a state, if the state shall neglect to appear, on due service of process, no coercive measures will be taken to compel appearance; but the complainant will be allowed to proceed *ex parte*.³

§ 434. The State of Rhode Island, on leave granted at January Term, 1838, to amend a bill filed against the State of Massachusetts, previously; amended the bill at the term of 1839, by inserting in it references to papers filed in 1838. The State of Massachusetts was allowed until 1840 to answer. The rules which govern courts of equity, as to the allowance of time for filing an answer and other proceedings, in suits between individuals, will not be applied by the Supreme Court of the United States to controversies between states of the Union. The parties in such cases must, in the nature of things, be incapable of acting with the promptness of an individual.⁴

¹ The State of New Jersey *v.* The State of New York, 5 Peters, 284.

² The State of Rhode Island *v.* The State of Massachusetts, 11 Peters, 227.

³ Commonwealth of Massachusetts *v.* Rhode Island, 12 Peters, 757.

⁴ The State of Rhode Island *v.* The State of Massachusetts, 13 Peters, 23.

§ 435. In all cases within the original jurisdiction of the Supreme Court, the bill or declaration is to be filed in the clerk's office of that court, and a process of subpoena is issued to be served on the defendant sixty days before the return day.¹

¹ See Rule 10, Appendix. *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 9 Howard, 647, 11 Howard, 528, 13 Howard, 518.

SUPPLEMENT.

NOTE.—The fifteenth volume of Howard's Reports having been received after the body of this work had been printed, it has become necessary to state the substance of the decisions contained in that volume, which bear upon the topics treated in the foregoing chapters, in the form of a supplement, under the appropriate heads. The several matters embraced in the following sections will be found referred to in the general index.

MATTER IN DISPUTE.

§ 436. The words "matter in dispute," in the twelfth section of the Judiciary Act, do not refer to disputes in the country, or the intentions or expectations of the parties concerning them, but to the claims presented on the record to the legal consideration of the court. What the plaintiff thus claims is the matter in dispute, though that claim may be incapable of proof, or only in part well founded. So it was held under this section of the statute, and in reference to the right of removal of a cause from a state court to a circuit court, in *Gordon v. Longest*, 16 Peters, 97; and the same construction has been put upon the eleventh and twenty-second sections of the Judiciary Act, which make the jurisdiction of the Supreme Court and the circuit courts dependent on the amount or value in dispute.¹

¹ *Kanouse v. Martin*, 15 Howard, 108, 207.

JURISDICTION UNDER THE TWENTY-FIFTH SECTION OF THE JUDICIARY ACT.

§ 437. Although it is in general true that a party, claiming a right under an Act of Congress, must avail himself of some legal means to place on the record that claim, and the facts on which it rests; otherwise he cannot have the benefit of a re-examination of the judgment upon a writ of error; yet there is one exception to this rule. This exception is where the right to remove a cause from a state court to a circuit court is claimed under the twelfth section of the Judiciary Act. The statute provides that the defendant, in cases where the right to remove exists, shall file a bond and petition in the state court, and thereupon the state court shall proceed no farther in the cause. But if the defendant is required by the state court to plead to the jurisdiction the right of removal, or to make the facts on which it depends part of the technical record, he cannot do so without surrendering some part of the right which the act of Congress secures to him to have the proceedings in the state court immediately stayed, on suggestion of the facts on which the right to remove depends. And, therefore, where the Court of Common Pleas, in the City and County of New York, after a defendant had filed his bond and petition for removal, allowed the plaintiff to reduce the matter in dispute to the sum of \$499 00, by an amendment of the record, and then rendered judgment for the plaintiff; from which judgment the defendant prosecuted a writ of error to the Superior Court of the City of York, and that court refused to reverse the judgment, because the plaintiff in error did not plead to the jurisdiction of the court below, and spread the facts which gave him the right of removal upon the technical record;—the Supreme Court of the United States, upon a writ of error to the judgment of the Superior Court, held that the Superior Court ought to have inspected the proceedings under the Act of Congress which showed the judgment of the Court of Common Pleas to be erroneous, and

that its failure to do so was error, which could be corrected under the twenty-fifth section of the Judiciary Act.¹

§ 438. In the same case, it was held that as the plaintiff in error could not, consistently with the Act of Congress, be required to follow the case further in the Court of Common Pleas, and, therefore, could not be required to appeal from a special to a general term of that court, the Superior Court became the highest court of the state to which his complaint of the judgment of the Court of Common Pleas could be carried.²

OBLIGATION OF CONTRACTS.

§ 439. A law may so affect the remedy on a contract, as to impair the obligation of the contract. The obligation of a contract, in the sense in which these words are used in the Constitution, is that duty of performing it which is recognized and enforced by the laws. And if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same.³

§ 440. In 1836 the Legislature of Arkansas incorporated a bank with the usual banking powers of discount, deposit, and circulation, the state being the sole stockholder. The bank went into operation, and issued bills in the usual form, but in 1839 suspended specie payments. The legislature afterwards passed successive acts, 1, continuing the corporate existence of the Bank, and subjecting its affairs to the management of a financial receiver and an attorney, who were directed to cancel certain bonds of the state, held by the bank for money borrowed by the state, and reduce the state's capital in the bank by an equal amount; 2, direct-

¹ Kanouse v. Martin, 15 Howard, 198.

² Ibid.

³ Curran v. State of Arkansas, 15 Howard, 304.

ing the officers to transfer to the state a certain amount of specie, for the purpose of paying the members of the legislature ; 3, requiring the officers to receive the bonds of the state which had been issued as part of the capital of the bank in payment for debts due to the bank ; 4, taking away certain specie and par funds for the purpose of paying the members of the legislature, and placing other funds to the credit of the state, subject to be drawn out by appropriation ; 5, vesting in the state all titles to real estate or other property taken by the bank in payment for debts due to it ; and 5, requiring the officers to receive, in payment of debts due to the bank, not only the bonds of the state, which had been issued to constitute the capital of the bank, but those also which had been issued to constitute the capital of other banking corporations which were then insolvent. The Supreme Court of the United States held that these laws, so far as they withdrew the assets of the bank from the reach of its creditors, violated the obligations of two contracts, viz.: 1st. The contract between the bill-holders and the bank, arising upon the bills which were payable on demand ; and 2d. The contract between the bill-holders and the state, arising from the deposit by the state of funds in the bank for the purpose of paying its debts.¹ The case is so important and instructive that no mere abstract can supply to the reader the full benefit of the reasoning of the court, which was as follows : " The plaintiff in error filed his bill in equity in the Circuit Court of that State for the County of Pulaski, against the State of Arkansas, the State Bank of Arkansas, and the financial receiver and the attorney of the bank ; and the defendants having demurred thereto, the circuit court overruled the demurrer, and, as the defendants elected to rest thereon, the court made a decree in favor of the complainant. The defendants appealed to the Supreme Court, where the demurrers were sustained, and the bill ordered to be dismissed. This decree the plaintiff has brought here for re-examination under the 25th section of the Judiciary Act."

¹ *Curran v. The State of Arkansas*, 15 Howard, 304.

“As the questions to be determined arise on a demurrer to the bill, the substance of the case, therein made and confessed by the demurrer, must be stated, to exhibit the grounds on which our decision rests.

“The bill shows that the Bank of the State of Arkansas was incorporated by the legislature of that State in 1836, with the usual banking powers of discount, deposit, and circulation, and that the state in fact was, and was designed by its charter to be, its sole stockholder. That the capital stock of the bank consisted of \$1,146,000, raised by the sale of bonds of the state, together with certain other sums paid in by the state as part of the capital stock, amounting in the aggregate to the sum of \$350,753, being in the whole \$1,496,753; all which was in specie, or specie funds. That the bank was required by its charter to have on hand at all times sufficient specie to pay its bills on demand. That the plaintiff, being the owner and bearer of bills of this bank, amounting to upwards of \$9,000, which the bank had refused to pay, instituted suits and recovered judgments thereon at law, upon which executions, running against the goods, chattels, and lands of the bank, have been duly returned wholly unsatisfied. The general scope of the bill, therefore, is to obtain the aid of a court of equity to reach such assets of the bank as ought to be appropriated to satisfy this judgment-debt. The parties in whose hands it is alleged these assets are, are the State of Arkansas and two other defendants, who are alleged to have charge of certain effects of the bank, in behalf, and under the authority of the state.

“To make a case against these parties, and show that they hold property, which in equity belongs to its creditors, and ought to be appropriated to pay their debts, the bill states that the bank having gone into operation, and issued bills to a large amount, which were then in circulation, gave public notice, on the 7th day of November, 1839, that the payment of specie was definitely and finally suspended, and thenceforward, with some comparatively trifling exceptions, has refused to redeem any of its bills.

• That in January, 1843, the bank still continuing insolvent, an Act was passed by the legislature to liquidate and settle its affairs. That the assets of the bank then amounted to \$1,832,120, of which the sum of \$1,000,000 was good and collectable; and that it had then on hand the sum of \$90,301 in specie. This Act expressly continued the corporate existence of the bank; its affairs were subjected to the management of a financial receiver and an attorney, who were to apply the moneys collected by them to redeem the outstanding circulation of the bank; but, at the same time, bonds of the state, held by the bank, for money borrowed by the state, amounting to at least \$200,000, were required by this Act to be given up and cancelled, and their amount to be credited to the bank against a part of the capital stock put in by the state. The bill further shows, that by another Act passed at the same February session, in 1843, the officers of the bank were required to transfer to the state the sum of \$15,000 in specie, which was appropriated by the Act to pay the members of the legislature. That on the 4th day of January, 1845, another Act was passed, authorizing the officers of the bank to compromise its debts receivable, and take specific property in payment, and requiring those officers to receive in payment the bonds of the state, issued to raise capital stock for the bank, notwithstanding the bills of the bank might not have been taken up.

“That on the 10th day of January, 1845, another Act was passed, depriving the bank of all its specie and par funds, and appropriating the specie, first, to pay the members of that legislature, and declaring that certain funds which had been placed in the bank, and made by the charter to form a part of its capital stock, should be deemed to be deposited there to the credit of the state, subject to be drawn out by appropriation.

“That by another Act, passed on the 23d day of December, 1846, the title to all real estate and property of every kind, purchased by said bank, or taken in payment of debts due to it, was declared to be vested in the state, and titles to

property received on account of debts due to the bank were required to be taken thereafter in the name of the state, and the bill avers that many different parcels of land specifically mentioned and described, have been conveyed to the state, under this law, by debtors of the bank in satisfaction of their indebtedness.

“The bill further states, that, by another Act, passed on the 9th day of January, 1849, the officers of the bank were required to receive, in payment of its debts, bonds of the state, issued to raise capital for the Real Estate Bank of Arkansas and other banking corporations theretofore chartered by the General Assembly, and then insolvent; which last-mentioned bonds amounted to at least \$2,000,000.

“The bill prays, among other things, for satisfaction of the plaintiff's judgment-debt out of the assets of the bank thus shown to have come into the custody, or to stand in the name, or to have gone to the use of the state by force of the laws above-mentioned; and the jurisdiction of this court, under this writ of error, is invoked, upon the ground that these laws, or some of them, impair the obligation of a contract, and that the highest court of the state has held them valid, and by reason of such decision, dismissed the complainant's bill.

“It follows that there are three questions for our consideration.

“1. What would have been the rights of the complainant under the contracts shown by his bill, if uncontrolled by the particular laws of which he complains?

“2. Do those laws, or either of them, impair the obligation of any contract with the complainant?

“3. Does it appear, by the record, that the Supreme Court of Arkansas held these laws to be valid, and by reason thereof made a final decree against the complainant?

“The first of these questions may be answered without much difficulty. The plaintiff is a creditor of an insolvent banking corporation. The assets of such a corporation are a fund for the payment of its debts. If they are held by the

corporation itself, and so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among stockholders, or gone into the hands of others than *bonâ fide* creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts.

“This has been often decided, and rests upon plain principles. In 2 Story’s *Eq. Jur.*, § 1252, it is said, ‘Perhaps, to this same head of implied trusts upon presumed intention (although it might equally well be deemed to fall under the head of implied trusts by operation of law), we may refer that class of cases where the stock and other property of private corporations is deemed a trust fund for the payment of the debts of the corporation; so that the creditors have a lien, or right of priority of payment on it, in preference to any of the stockholders of the corporation. Thus, for example: ‘The capital stock of an incorporated bank is deemed a trust fund for all the debts of the corporation; and no stockholder can entitle himself to any dividend or share of such capital stock, until all the debts are paid, and if the capital stock should be divided leaving any debts unpaid, every stockholder, receiving his share of the capital stock, would, in equity, be held liable *pro ratâ* to contribute to the discharge of such debts out of the fund in his own hands.’ In conformity with this is the doctrine held by this court in *Mumma v. The Potomac Company*, 8 Peters, 281.

“The cases of *Wood v. Dummer*, 3 Mason, 308; *Wright v. Petrie*, 1 Smedes and Marsh, 319; *Nevitt v. Bank of Port Gibson*, 6 Id., 513; *Hightower v. Thornton et al.*, 8 Georgia R., 493; *Nathan v. Whitlock*, 3 Edwards, C. R., 215, affirmed by the Chancellor (9 Paige, 152), contain elaborate examinations of this doctrine, and it has been affirmed and applied in many other cases.

“So far, therefore, as the property of this bank has become vested in the state or gone to its use, it is so vested and used,

charged with a trust in favor of this complainant as an unpaid creditor, unless there is something in the character of the parties, or the consideration upon which, or the operation of the laws by force of which, it has been transferred, taking the case out of the principles above laid down.

“And, first, as to the character of the parties. By the charter of this bank, the State of Arkansas became its sole stockholder. But the bank was a distinct trading corporation, having a complete separate existence, enabled to enter into valid contracts binding itself alone, and having a specific capital stock, provided, and held out to the public as the means to pay its debts. The obligations of its contracts, the funds provided for their performance, and the equitable rights of its creditors were in no way affected by the fact, that a sovereign state paid in its capital, and consequently became entitled to its profits. When paid in and vested in the corporation, the capital stock became chargeable at once with the trusts, and subject to the uses declared and fixed by the charter, to the same extent and for the same reasons, as it would have been if contributed by private persons.

“That a state, by becoming interested with others in a banking corporation, or by owning all the capital stock, does not impart to that corporation any of its privileges or prerogatives, that it lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege in respect to those transactions not derived from the charter, has been repeatedly affirmed by this court, in *The Bank of the United States v. The Planters' Bank*, 9 Wheat, 904; *Bank of Kentucky v. Wistar et al.*, 3 Pet. 431; *Briscoe v. The Bank of Kentucky*, 11 Id. 324; *Darrington et al. v. The Bank of Alabama*, 13 How. 12. And our opinion is, that the fact that the capital stock of this corporation came from the state, which was solely interested in the profits of the business, does not affect the complainant's right, as a creditor, to be paid out of its property; a right which, as we have seen, follows the fund into the hands of every person, save a *bona fide* creditor or purchaser,

and which a court of equity is bound to enforce by its decree against any party except such a creditor or purchaser, capable by law of being brought within its jurisdiction. That the State of Arkansas is capable of being thus sued, has been decided after a careful examination by the Supreme Court of that state in this suit; and as this is purely a question of local law, depending on the constitution and statutes of the state, we follow that decision, and hold, in conformity therewith, that by its own consent the state has become liable to a decree in favor of the complainant in this suit, if the complainant has valid grounds entitling him to the relief prayed.

“Whether there was anything in the consideration or circumstances of the transfers of the property of the bank to the state, or to its use, which relieved that property from the trust in favor of creditors, may best be examined under the next question, which is, do the laws, by force of which these transfers were made, impair the obligation of any contract with the complainant.

“This question can be answered only by ascertaining what contracts existed, and what obligations were attached to them and then by examining the actual operation of those laws upon those contracts and their obligations.

“The plaintiff was the bearer of bills of the bank, by each of which the bank promised to pay him, on demand a certain sum of money. Of course these payments were to be made out of the property of the bank. By the laws of the state, existing when these contracts were made, their bearer had the right by legal process, to compel their performance by the levy of an execution on the goods, chattels, lands, and tenements of the bank, by garnisheeing its debtors, and by resorting to a court of equity to reach equitable assets, or property conveyed to others than creditors and *bona fide* purchasers.

“Such were these contracts and their obligations, and it would seem to require no argument to prove that a law authorizing and requiring such a corporation to distribute its property among its stockholders, or transfer it to its sole stockholder,

leaving its bills unredeemed, would impair the obligation of the contracts contained in those bills. The cases of *Bronson v. Kinsie et al.*, 1 How. 311; and *M'Cracken v. Hayward*, 2 Id. 608, which will be more particularly adverted to hereafter, leave no doubt on that point. Indeed it has not been attempted to be maintained, that such a law operating on the property of a mere private corporation, whose character the legislature could not repeal, would be valid. But it is argued that this is a different case. That the legislature has power to destroy this corporation, and thereupon its contracts are no longer in existence, and cannot be enforced against the property of the corporation, which, upon the repeal of its charter, reverts to the grantors of its lands and escheats, so far as it is personalty to the state, and that, if it be in the power of the state thus to destroy the remedies of creditors, by repealing the charter, their rights must be considered to be entirely subject to the will of the state, and no law can impair the obligation of their contracts, because subjection to any law which may be passed belongs to the very existence of such contracts. Or, to express the same ideas in different words, that the state created and can destroy the corporation and all its contracts, and, as it can destroy them by repealing the charter, it can modify, obstruct, and abridge the rights of creditors and the obligations of their contracts without repealing the charter.

“Neither these premises, nor the conclusion deduced from them, can be admitted.

“This banking corporation, having no other stockholder than the state, it is not doubted that the state might repeal its charter; but that the effect of such a repeal would be entirely to destroy the executory contracts of the corporation, and to withdraw its property from the just claims of its creditors, cannot be admitted. If such were the effect of a repeal of an act incorporating a bank containing no express power of repeal, it might be difficult to encounter the objection, that the repealing law was invalid, as conflicting with the Constitution of the United States. This argu-

ment was pressed on this court, in the case of *Mumma v. The Potomac Company* (8 Pet.), and it was met by the following explicit language:—

“ ‘We are of opinion that the dissolution of the corporation, under the Acts of Virginia and Maryland, cannot in any just sense be considered, within the clause of the Constitution of the United States on this subject, an impairing of the obligation of the contracts of the company by those states, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of *bonâ fide* purchasers, but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws.’

“ ‘Indeed, if it be at once admitted that the property of an insolvent trading corporation, while under the management of its officers, is a trust fund in their hands for the benefit of creditors, it follows, that a court of equity, which never allows a trust to fail for want of a trustee, would see to the execution of that trust, although by the dissolution of the corporation the legal title to its property had been changed, *Mumma v. The Potomac Company*, 8 Pet. 281; *Wright v. Petrie*, 1 S. & M. Ch. R. 319; *Nevitt v. The Bank of Port Gibson*, 6 S. & M. 513; 1 Ed. Ch. R.; S. C. 9 Paige; *Read v. Frankfort Bank*, 23 Maine R. 318. And, in this point of view, the decision of this court, in *Lennox et al. v. Roberts*, 2 Wheat. 373, is applicable.

It was a suit in equity, brought by persons to whom, at the expiration of the charter of the Bank of the United States, its effects were conveyed by deed, in trust for creditors and stockholders. Among these effects were certain promissory notes indorsed by the defendant, which the bill prayed he might be compelled to pay. The complainants had not the legal title transferred to them by indorsement upon the notes. This court held that the suit was maintainable. And this decision necessarily involves two points.

First, That the expiration by the charter had not released the indorser. Second, That a court of equity would lend its aid to trustees for creditors of the bank to enforce payment of the notes. We do not think that the omission of the bank to appoint a trustee would vary the substantial rights of creditors in a court of equity.

“Whatever technical difficulties exist in maintaining an action at law by or against a corporation after its charter has been repealed, in the apprehension of a court of equity, there is no difficulty in a creditor following the property of the corporation into the hands of any one not a *bonâ fide* creditor or purchaser, and asserting his lien thereon, and obtaining satisfaction of his just debt out of that fund specifically set apart for its payment when the debt was contracted, and charged with a trust for all the creditors when in the hands of the corporation, which trust the repeal of the charter does not destroy. Chancellor Kent, in 2 Com. 307 n., says: ‘The rule of the common law has, in fact, become obsolete. It has never been applied to insolvent or dissolved moneyed corporations in England. The sound doctrine now is, as shown by statutes and judicial decisions, that the capital and debts of banking and other moneyed corporations, constitute a trust fund and pledge for the payment of creditors and stockholders, and a court of equity will lay hold of the fund, and see that it be duly collected and applied. The case of *Hightower v. Thornton*, 8 Georgia, R. 491, and other cases before referred to in this opinion, are in conformity with this doctrine; and, in our judgment, a law distributing the property of an insolvent trading or banking corporation among its stockholders, or giving it to strangers, or seising it to the use of the state, would as clearly impair the obligation of its contracts as a law giving to the heirs the effects of a deceased natural person, to the exclusion of his creditors, would impair the obligation of his contracts.

“But, if it could be maintained that the repeal of the charter of this corporation would be operative to destroy the

obligation of its contracts, it would not follow that anything short of a repeal could have that effect. The only ground upon which such a power could be claimed, is, that inasmuch as the power of repeal exists when the contract is made, and inasmuch as the necessary effect of a repeal is to put an end to the obligation of the contracts of the corporation, all its contracts are made subject to this contingency, and with an inherent liability to be thus destroyed. We have already said, that it is not the necessary effect of a repeal of the charter to destroy the obligations of contracts; but if it were, and they were entered into subject to this liability, upon what ground could it be maintained that merely suspending certain powers of the corporation, its existence being preserved, can be followed by any such consequence? Surely it is not the necessary effect of a prohibition to transact new business, to destroy contracts already made; and if not, how can the right and power to destroy them be considered to grow out of a power to make such a prohibition? or how can it be fairly assumed, because the creditor knew when he received the contract of the bank that the legislature could at any time deprive it of power to enter into new engagements, and, therefore, must be taken to have assented to the exercise of that power at the discretion of the legislature, that he must also be considered as assenting to the exercise of a totally different power, viz., the power to destroy contracts already made? Legislative powers, over contracts lawfully existing, when the contracts are formed, affect the nature, and enter into the obligations of those contracts. But such powers can be exerted only in the particular cases in reference to which they have been reserved; and they are inoperative in all other cases. And until such a case arises, the obligation of such a contract can no more be impaired than if it were under no circumstances subject to legislative control. The assumption that because the legislature may destroy a contract by repealing the charter of the corporation which made it, therefore such a contract may be impaired, or altered, or destroyed, in any

manner the legislature may think fit, without repealing the charter, is wholly inadmissable.

“Now, the charter of this bank has never been repealed. On the contrary, the twenty-eighth section of the Act of the 31st day of January, 1843, expressly provided, ‘That nothing in this Act shall be so construed as to impair or destroy the corporate existence of the said bank of the State of Arkansas, but the charter of the said institution is only intended to be so limited and modified as that said bank shall collect in and pay off her debts, abstain from discounting notes, or loaning money, and liquidate and close up her business as is hereinafter provided.’ Subsequent laws have still further limited and modified the corporate powers, but the corporate existence has not been touched, and the corporation is made a party to this suit, and appears on the record.

“We do not consider, therefore, that the power of the state to repeal this charter enables the state to pass a law impairing the obligation of its contracts.

“We have thus considered only the contracts between the complainant and the bank, arising out of the bills of the bank held by him, and some of the obligations of those contracts. But this is not the only contract with the complainant. It is true that, as the state was the sole stockholder in this bank, the charter cannot be deemed to be such a contract between the state and the corporation, as is protected by the Constitution of the United States. But it is a very different question whether that charter does not contain provisions, which, when acted upon by the state and by third persons, constitute in law a binding contract with them, the obligation of which cannot be impaired.

“If a person deposit his property in the hands of an agent, he may revoke the agency, and withdraw his property at his pleasure. But if he should request third persons to accept the agent’s bills, informing them, at the same time, that he had placed property in the hands of that agent to meet the bills at their maturity, and upon the faith of such

assurance the agent's bills are accepted, the principal cannot, by revoking the agency, acquire the right to withdraw his property from the hands of the agent.

“ It is no longer exclusively his. They who, on the faith of its deposit, have changed their condition, have acquired rights in it. The matter no longer rests in a mere delegation of a revokable authority to an agent, but a contract has arisen between the principal and the third persons from the representations made, and the acts done on the faith of it, and the property cannot be withdrawn without impairing the obligation of that contract.

“ Now the charter of this bank provides (§ 1), that it shall have a capital stock of one million of dollars, to be raised by the sale of the bonds of the state, and also (§ 13), that certain other funds, which are specifically described, shall be deposited therein by the state, and constitute a part of the capital of the bank, and the bill avers that the bonds of the state, amounting to one million of dollars, and also other bonds of the state, amounting to one hundred and forty-six thousand dollars, authorized by a subsequent act of the Assembly, were sold, and their proceeds, together with the other funds mentioned, were paid into the bank to constitute its capital stock.

“ The bank received this money from the state as the fund to meet its engagements with third persons, which the state, by the charter, expressly authorized it to make for the profit of the state. Having thus set apart this fund in the hands of the bank, and invited the public to give credit to it, under an assurance that it had been placed there for the purpose of paying the liabilities of the bank, whenever such credit was given, a contract between the state and the creditor not to withdraw that fund to his injury, at once arose. That the charter, followed by the deposit of the capital stock, amounted to an assurance, held out to the public by the state, that any one who should trust the bank might rely on that capital for payment, we cannot doubt. And when a third person acted on this assurance, and parted

with his property on the faith of it, the transaction had all the elements of a binding contract, and the state could not withdraw the fund, or any part of it, without impairing its obligation.

“We proceed, therefore, to examine the laws complained of, to ascertain what is their operation upon the obligations of the several contracts with the state and with the bank, which are above declared to exist. The learned counsel for the State of Arkansas has, with great ability, presented a view of these laws, which requires consideration. It is this. That so far as these laws withdraw specie and funds from the bank, and appropriate them to the uses of the state, the state acted in the character of a creditor, taking a preference over the creditors, and paying itself a debt; and that the other laws, by force of which all the real property of the bank was vested in the state, are not to be deemed to have been passed in denial of the rights of creditors, but only the better to protect and give effect to those rights; that the trust in favor of creditors still subsists to be worked out in such manner as the state shall deem proper.

“To maintain the first proposition, it must appear that the state stood in such a relation to this bank and its creditors at the time these laws were passed; that it was a creditor, and could provide by law for the payment of its debt in preference to other creditors; and, secondly, that these laws do not withdraw and apply to the use of the state any greater sum than the amount of such debt.

“In our judgment, the state cannot be considered to have occupied this position. It had placed its bonds in the possession of the bank, with authority to sell them and hold their proceeds as capital. It had also paid over to the bank certain other funds, with an express declaration, contained in the thirteenth section of the charter, that these also were to be part of its capital, and were to have credited to them their proportion of dividend of the profits of the business. All these moneys were thus set apart, in the hands of the bank, as a fund, upon the credit of which it was to issue

bills, and which was to be liable to answer the engagements of the bank contracted to its creditors in the course of the business which it was authorized to transact for the profit of the state. Such is the necessary effect of the express declaration in the charter, that these funds constitute the capital of the bank.

“When this bank became insolvent, and all its assets were insufficient to perform its engagements, it is manifest that every part of these assets stood bound by the contracts which had been made with the bank upon the faith of the funds thus set apart by the charter; and it is equally clear that the bank no longer had in its possession any capital stock belonging to the state. Whatever losses a bank sustains are losses of the capital paid in by its stockholders; that is the only fund it has to lose. When it has become insolvent, it has lost all that fund, and has nothing belonging to its stockholders. In some sense a bank may be said to be indebted to its stockholders for the capital they have paid in. With the leave of the state, they have a right to withdraw it after all debts are paid, and, if the state is itself the sole stockholder, it may withdraw its capital while any of it shall remain. But, from the very nature of things, it cannot withdraw capital from an insolvent bank, because it has none of their capital remaining. When insolvent, its assets belong solely to its creditors.

“It is unnecessary, therefore, to decide what were the rights and powers of the state in respect to any portion of these funds while the bank continued solvent. When it became insolvent, when its entire property was insufficient to pay its debts, it no longer had any capital stock belonging to the state, and, therefore, none could be withdrawn, without appropriating by law to the use of the state what by the charter stood pledged to creditors, and such a law impairs the obligations of the contracts of the bank, and also the obligation of the contract between the state and the creditors, arising from the provisions of the charter devoting these funds to the payment of the debts of the bank.

“In addition to this it must be observed that the averments of the bill, which are confessed by the demurrer, show that the whole amount of the funds mentioned in the thirteenth section of the charter, which it is claimed the state had the right to withdraw, was \$350,753, and that the amount actually withdrawn and appropriated to the use of the state was at least \$400,000. On an investigation of the accounts, these averments might appear to be erroneous; but we are obliged to consider them to be true, as they are confessed on the record.

“Our opinion is, that these laws which withdraw from the bank the sum of \$400,000, according to the averments in the bill, cannot be supported upon the ground that the state had the right, as a creditor of the bank, to appropriate these funds to its own use.

“Nor can we find sufficient support for the other position, that the laws divesting the bank of its property, and vesting it in the state, do not impair the obligations of the plaintiff's contracts, because they were not passed in denial, but in furtherance of the rights of creditors, and to afford them a remedy, and for the prevention of further loss.

“Passing over the laws which, upon their face, not only withdraw funds from the bank, but appropriated those funds to the use of the state, and which, therefore, cannot be supposed to be in furtherance of the rights of creditors, or intended to protect them from loss, or not to be in denial of their rights, to so much of the property of the bank as was thus withdrawn, there are four acts complained of by the bill which require examination, with a view to see whether they can be considered as remedial only, and in that point of view consistent with the obligations of the contracts of the plaintiff. The first is the Act of January 4, 1845. The seventeenth section of this Act is as follows: ‘That said financial receivers be required to receive, in whole or in part payment of any debt due the bank, the bonds of the state, which were sold in good faith to put said bank and branches

in operation, notwithstanding the outstanding circulation of said bank and its branches may not be taken up.'

"We cannot attribute to this provision of law any other meaning or effect than what is plainly apparent on its face. It authorizes and requires the assets of the bank to be appropriated to pay debts of the state; and we cannot conceive how this can be reconciled with the rights of creditors to those assets, or how it can consist with the execution of a trust in their favor, or how it differs from the other laws appropriating the property of this insolvent bank to the use and benefit of the state.

"The circumstance that these bonds were sold by the state, through the agency of the bank, to obtain funds to constitute the capital of the bank, do not make them debts of the bank. They were bonds under the seal of the state, signed by the governor, and countersigned by the treasurer, containing an acknowledgment that the State of Arkansas stood indebted, and a promise by the state to pay. The president and cashier of the bank are empowered to transfer them by endorsement; but no liability, even of the conditional character which arises from the endorsement of negotiable paper by the law merchant, is attached by the charter to these endorsements, and, from the nature of the case, we do not see how any such could have been intended. We do not deem it necessary to determine, whether, under the fifteenth section of the charter, the bank was made liable for the accruing interest on the bonds. It would seem that this section is merely directory to the general board, and was intended to provide for the payment of interest out of expected profits; but, however this may be, to suppose that the charter intended the fund raised by the sale of these bonds, and which it held out to creditors as capital of the bank, could, at any time, be appropriated to pay these bonds, leaving the creditors, who had dealt with the bank on the faith of that capital, wholly unpaid, would be to give it a construction not supported by any provision which we have been able to discover in it, and directly in conflict with its

manifest purpose and meaning. For in no fair sense can the bank be considered to have had the proceeds of these bonds as so much capital, if it was liable, at the pleasure of the state, to be swept away at any moment to pay the debts which the state had contracted to borrow it. In such a condition of things, these proceeds would be nothing more than a deposit payable on demand; and to call them capital, and allow the public to trust to them as such, would involve a plain contradiction.

“Indeed, upon this construction of the charter, taken in connection with the alleged right to withdraw at pleasure all the other funds deposited, the bank had no proper capital which was bound by its contracts; and this would render it extremely difficult to maintain the validity of the charter under the tenth section of the first article of the Constitution of the United States, prohibiting the states from emitting bills of credit. It is well known that the power of the several states to create corporations to issue bills, and transact business for the sole benefit of the state which appointed the corporate officers, and was alone interested in the bank, has been from time to time seriously questioned. The cases of *Briscoe v. The Bank of Kentucky*, 11 Peters, 257, and *Darrington et al. v. The Bank of Alabama*, 13 Howard, 12, have settled this question, in reference to such banks as were involved in those cases. But the principal ground on which such bills were distinguished from bills of credit emitted by the state, was, that they do not rest on the credit of the state, but on the credit of the corporation derived from its capital stock.

“But if the charter of the bank has not provided any fund effectually chargeable with the redemption of its bills, if what is called its capital is liable to be withdrawn at the pleasure of the state, though no means of redeeming the bills should remain, then the bills rest wholly upon the faith of the state and not upon the credit of the corporation founded on its property. We do not perceive, in the charter of the State Bank of Arkansas, an intention to create such a bank

and emit such bills: on the contrary, we think it plainly appears to have been intended to make a bank having a real capital, on the credit of which its business was to be transacted, and this intention is necessarily in conflict with the existence of the power anywhere to appropriate the funds of the bank, after it became insolvent, to pay debts of the state contracted to borrow the money which constituted that capital.

“By the Act of December 23, 1846, the financial receivers were authorized in certain cases to pay judgment-creditors in notes of non-resident debtors, provided such judgment-creditors would convey to the state all lands of the bank on which they had levied: and by another Act, passed on the same day, all conveyances of real estate purchased for, or taken in payment of, any debt due to the bank, were required to be made to the state, and all such titles were declared to be vested in the state. The second section of this law is in the following words: ‘That the governor is hereby authorized to exchange any property so taken by the said bank, for an equal amount of the bonds of the state executed for the benefit of said institution: provided that such property shall not be exchanged with the holders of such bonds at less prices than were allowed by the bank for the same, and that the governor be authorized to make titles and give acquittances for the same; and this Act shall take effect and be in force from and after its passage.’

“If this law had contained only the first section, vesting the real property of the bank in the state, and providing no remedy by which this complainant, as a creditor of the bank, could reach it, we think it would have impaired the obligation of his contracts. True, it does not touch the right of action against the bank; it only withdraws the real property from the reach of legal process, and thus affects the remedy. But, it by no means follows because a law affects only the remedy, that it does not impair the obligation of the contract. The obligation of a contract, in the sense in which those words are used in the Constitution, is that duty of per-

forming it which is recognized and enforced by the laws. And if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same.

“This has been the doctrine of this court from a very early period. In *Green v. Biddle*, 8 Wheat. 1, Mr. Justice Washington, delivering the opinion of the court, said: ‘It is no answer that the Acts of Kentucky now in question, are regulations of the remedy and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests.’ In *Bronson v. Kinzie*, 1 How. 311, Mr. Chief Justice Taney, delivering the opinion of the court, and speaking of the above rule, as laid down in *Green v. Biddle*, said: ‘We concur entirely in the correctness of the rule above stated. The remedy is the part of the municipal law which protects the rights, and the obligation by which it enforces and maintains it. It is this protection which this clause in the Constitution was mainly intended to secure.’

“The difficulty of determining, in some cases, whether the change in the remedy has materially impaired the rights and interest of the creditor, must be admitted. But we do not think any such difficulty exists in this case. The decision of this court in *McCracken v. Hayward*, 2 How. 608, must be considered as settling this question. In that case, the law under consideration provided that a sale should not be made of property levied on under an execution, unless it would bring two-thirds of its valuation by three householders. It was held that such a law so obstructed the remedy as to impair the obligation of the contract. The law now in question certainly presents a far more serious obstruction, for it withdraws the real property of the bank altogether from the reach of legal process, provides no substituted remedy, and leaves the creditor, as is truly said by the Supreme Court of Arkansas, in its opinion in this case, ‘in a condition in which

his rights live but in grace, and his remedies in entreaty only.'

"But not only does this law withdraw the real property from the bank and vest it in the state, but by the second section, the terms of which have been given, the property so withdrawn is expressly appropriated to pay the bonds of the state. An appropriation, which, as has been above stated, cannot be reconciled with the preservation of the rights of creditors, whether those rights are to be protected by existing legal remedies, or in any other manner.

"The same observations apply to so much of the Act of the 9th of January, 1849, as required the officers of the bank to receive in payment of debts due to the bank bonds of the state issued to obtain capital to put in operation the Real Estate Bank of the State of Arkansas, which bonds are averred in the bill to have amounted to \$2,000,000. If a law which withdrew assets of the bank to pay bonds sold to raise its capital, impaired the obligation of the complainant's contracts, it would probably not be supposed that a law applying such assets to pay bonds of the state sold to raise capital for another bank could be free from that objection.

"It only remains to consider the third question, whether it appears by the record that the Supreme Court of Arkansas held these laws to be valid, and by reason thereof dismissed the complainant's bill?

"Each of these laws is specifically referred to in the bill, and its operation upon the property of the bank averred, and made a subject of complaint. If a private person had received assets of the bank in the same manner they are alleged in the bill to have been received by the state, he must have been held amenable to the complainants as a creditor of the bank in a court of equity. We have already stated that by the local law of Arkansas the state stands in the same predicament as a private person, in respect to being chargeable as a trustee, unless it is exempted by force of the laws in question. It necessarily follows, therefore, that the Supreme Court of the state held these laws valid,

and that by force of them the state was not subject to the principles upon which it would otherwise have been chargeable.

"It is sufficient to give this court jurisdiction under the twenty-fifth section of the Judiciary Act, that it appears by the record that the question, whether a law of a state impaired the obligation of a contract, was necessarily involved in the decision, and that such law was held to be valid, and the decision made against the plaintiff in error by reason of its supposed validity. *Armstrong v. The Treasurer of Athens County*, 16 Peters, 281; *Crowell v. Randall*, 10 Peters, 392; *M'Kinney v. Carrol*, 12 Peters, 66.

"The result is, that so much of each of the said laws of the State of Arkansas, as authorized and required the cancellation of the bonds of the state, given for money borrowed of the bank of the State of Arkansas, or authorized and required the withdrawal of any part of the specie or other property of that bank, and the appropriation thereof to the use of the state, or authorized and required the application of any part of the assets or property of that bank to pay bonds issued by the state, and sold to raise capital for the Bank of the State of Arkansas, or for the Real Estate Bank of the State of Arkansas, or authorized and required real property purchased for the Bank of the State of Arkansas, or taken in payment of debts due to the Bank of the State of Arkansas, to be conveyed to, and the title thereof vested in the State of Arkansas, impaired the obligation of contracts made with the complainant as the lawful holder and bearer of bills of the Bank of the State of Arkansas, and so were inoperative and invalid. And, consequently, the judgment of the Supreme Court of that state must be reversed, and the cause remanded, that it may be proceeded in as the Constitution of the United States requires."¹

¹ The opinion of the court was delivered by Mr. Justice Curtis. Mr. Justice Catron, Mr. Justice Daniel, and Mr. Justice Nelson dissented.

WHAT MUST BE DISCLOSED BY THE RECORD, TO GIVE JURISDICTION UNDER THE TWENTY-FIFTH SECTION OF THE JUDICIARY ACT.

§ 441. A party was sued in the territorial court of Florida, while Florida was yet a territory. After Florida became a state, and the territorial court in which the suit was pending had ceased to exist, the papers were transmitted to the circuit court of the state for the same county. Both the plaintiff and defendant appeared in the latter court, the cause proceeded to trial, and a verdict was rendered for the plaintiff. The defendant thereupon moved for a new trial, but the motion was overruled. He, thereupon, offered to prove that he was a citizen of Georgia at the time the suit was brought; and this fact being admitted by the plaintiff, the defendant then moved in arrest of judgment, upon the ground that under the Act of Congress of Feb. 22d, 1847, the suit was, by operation of law, transferred to the District Court of the United States for the District of Florida, and that the circuit court of the state had no right to take possession of the papers, or to try the cause. The motion was refused, and judgment entered on the verdict. Whereupon the defendant appealed to the Supreme Court of the state, the judgment of the circuit court was affirmed, and the defendant then sued out a writ of error to the Supreme Court of the United States, upon the ground that the decision of the highest court of the state had been given against a right claimed under an act of Congress.

§ 442. The Supreme Court of the United States, upon a motion to dismiss the writ of error for want of jurisdiction, held that the right claimed by the plaintiff in error under an Act of Congress, not having been placed upon the record in the state court, and the fact that the plaintiff in error was a citizen of the State of Georgia, appearing only by new evidence offered on the motion in arrest of judgment, the state court could not go behind the record to notice that fact, and consequently that in proceeding to give judgment

on the verdict, the state court could not legally have decided on the validity of the plaintiff's objection to its jurisdiction. The writ of error was, therefore, dismissed, upon the ground that the record did not disclose a decision made by the State Court against a right claimed under an act of Congress.¹

¹ *Carter v. Bennett*, 15 Howard, 354. In disposing of this case, Mr. Chief Justice Taney said: "Upon this motion to dismiss the writ of error, the construction of the Act of Congress of 1847 is not before us. In this stage of the case we are not called on to decide whether this Act of Congress did or did not, *proprio vigore*, transfer the case to the District Court of the United States. The only question presented by the motion is, whether, upon the record before us, we have a right to reverse the judgment of the state court? And, in order to give this court jurisdiction over the judgment of the state court, it must appear by the record that the right now claimed by the plaintiff in error to remove the case to the District Court of the United States, was so drawn in question in the state court, that it must have been decided in the judgment it has given.

"Now, there is nothing in the pleadings to show that Carter was a citizen of Georgia. It is not so stated in the declaration or plea. And when the papers were transmitted to the state court, he appeared there, and defended himself upon the plea of the general issue, which he had put in in the territorial court. This plea admitted the jurisdiction of the court; and the case was tried, and the verdict rendered upon these pleadings. And upon a motion in arrest of judgment the court cannot look beyond the record; and the judgment cannot be arrested, unless there is some error in law, or defect of jurisdiction apparent in the proceedings. And here there was no error or defect of jurisdiction apparent on the record, even if the construction of the Act of 1847, contended for by the plaintiff in error, is the true one. Both parties, by their pleadings, admitted the jurisdiction of the court; and there was no averment, in any part of them, that Carter was a citizen of Georgia. And after a verdict is rendered, the judgment cannot be arrested by the introduction of new evidence on a new fact. It may, in a proper case, lay the foundation of a motion for a new trial, but not in arrest of judgment.

"It is evident, therefore, that the state court, in proceeding to give judgment on the verdict, could not legally have decided upon the validity of the plaintiff's objection to its jurisdiction. They could not hear evidence, in that stage of the case, to prove that Carter was a citizen of Georgia, nor judicially notice it when admitted by the opposite party. And we are bound to presume that they proceeded to judgment on this ground, and did not consider the right claimed by the plaintiff in error as properly before them.

"In an action in a circuit court of the United States, where the juris-

APPEAL AND FINAL DECREE.

§ 443. Where the respondent in a chancery suit in the circuit court took two grounds of defence, and the judge, in giving his reasons for a decree dismissing the bill, upon one of the two grounds, expressed his opinion that the respondent had not established the other ground, and thereupon the complainant appealed to the Supreme Court, by whom both grounds of defence were held insufficient, the decree reversed, and a mandate sent down accordingly; it was held, *first*, that there could be no appeal from an opinion expressed by the court below upon the facts of the case not affecting its decree; *second*, that the decree of the court below having been reversed by the Supreme Court, there existed no such decree as that appealed from; and, *third*, that the court below not having acted upon the mandate and made a final decree, there was no final decree to appeal from.¹

diction depends upon the citizenship of the parties, it has always been held that where the plaintiff avers in his declaration that he and the defendant are citizens of different states, if the defendant means to deny the fact and the jurisdiction, he must plead it in abatement; and if he omit to plead it in abatement, and pleads in bar to the action, he cannot avail himself of the objection at the trial. Still less could he be permitted to do so upon a motion in arrest of judgment. And the same principles which this court sanctions in such cases in the courts of the United States, upon questions of jurisdiction depending upon personal privilege, we are bound to apply to the proceedings in the state court.

"Undoubtedly it was in the power of the plaintiff in error, when he appeared to the suit in the circuit court of the state, to have pleaded to the jurisdiction, upon the ground that he was a citizen of Georgia. Whether such a plea could have been maintained or not, it is not necessary for us to say. But it would have brought before the court the construction of the Act of 1847, and it must have been judicially decided, And, if the decision had been against the right he claimed under it, this court would have had jurisdiction to hear and determine that question. But upon the record, as it comes before us, it does not appear that this question was ever presented to the state court in a manner that would enable it judicially to notice or decide it. And the writ of error must, therefore, be dismissed for want of jurisdiction."

¹ *Corning v. The Troy Iron and Nail Factory*, 15 Howard, 451.

APPENDIX.

I.

RULES AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

No. 1.

(FEBRUARY 3, 1790.)

Ordered, That JOHN TUCKER, Esq., of Boston, Clerk.
be the clerk of this court.

That he reside and keep his office at the seat of the National Government, and that he do not practise either as an Attorney or Counsellor in this Court while he shall continue to be Clerk of the same.

No. 2.

(FEBRUARY 5, 1790.)

Ordered, That (until further orders) it shall be requisite to the admission of Attorneys or Counsellors to practise in this Court, that they shall have been such for three years past in the Supreme Courts of the State to which they respectively belong, and that their private and professional character shall appear to be fair.

Admission of
Counsel.

No. 3.

(FEBRUARY 5, 1790.)

Ordered, That Counsellors shall not practise
Counsel. as Attorneys, nor Attorneys as Counsellors, in
 this Court. (*See Rule 14.*)

No. 4.

(FEBRUARY 5, 1790.)

Ordered, That they shall respectively take
Oath of Coun- sel. the following oath, viz.: "I, do so-
 lennly swear that I will demean myself (as an
 Attorney or Counsellor of this Court) uprightly,
 and according to law; and that I will support
 the Constitution of the United States." (*See*
Rule 6.)

No. 5.

(FEBRUARY 5, 1790.)

Ordered, That (unless and until it shall other-
Process in name of Presi- dent. wise be provided by law) all process of this Court
 shall be in the name of the President of the
 United States.

No. 6.

(FEBRUARY 7, 1791.)

Ordered, That the Counsellors and Attorneys
Oath of Coun- sel. admitted to practise in this Court, shall take
 either an oath, or in proper cases, an affirmation,
 of the tenor prescribed by the rule of this Court

on that subject, made February Term, 1790, viz.:
 “I, do solemnly swear (or affirm,
 as the case may be), that I will demean myself,
 as an Attorney or Counsellor of this Court, up-
 rightly, and according to law; and that I will
 support the Constitution of the United States.”
 (*See Rule 4.*)

No. 7.

(AUGUST 8, 1791.)

The Chief Justice, in answer to the motion of
 the Attorney-General, made yesterday, informs Practice in
Equity. him and the Bar, that this Court consider the
 practice of the Courts of King's Bench, and of
 Chancery, in England, as affording outlines for
 the practice of this Court; and that they will,
 from time to time, make such alterations therein
 as circumstances may render necessary.

No. 8.

(FEBRUARY 4, 1795.)

The Court gave notice to the gentlemen of
 the Bar, that hereafter they will expect to be Points.
 furnished with a statement of the material points
 of the case from the Counsel on each side of a
 cause. (*See Rules 29, 53, and 57.*)

No. 9.

(FEBRUARY 17, 1795.)

The Court declared, that all evidence on

But, discharge on. motion for a discharge upon bail must be by way of *deposition*, and not *civa voce*.

No. 10.

(AUGUST 12, 1796.)

Service on a State, &c. *Ordered*, That when process at Common Law, or in Equity, shall issue against a State, the same shall be served on the Governor, or Chief Executive Magistrate, and Attorney-General of such State.

Ordered, That process of subpoena, issuing out of this court, in any suit in Equity, shall be served on the defendant sixty days before the return day of the said process; and further, that if the defendant, on such service of the subpoena, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.

No. 11.

(FEBRUARY 13, 1797.)

Record returned on writ of Error. It is ordered by the Court, that the Clerk of the Court to which any writ of error shall be directed, may make return of the same, by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the Court. (*See Rule 31.*)

No 12.

(AUGUST 7, 1797.)

It is ordered by the Court, that no record of

the Court be suffered by the Clerk to be taken out of his office, but by the consent of the Court; otherwise, to be responsible for it. (*See Rule 35.*) Record not to be taken from Clerk's office.

No. 13.

(AUGUST 15, 1800.)

IN THE CASE OF COURSE *vs.* STEAD'S EXECUTORS.

Ordered, That the plaintiff in error be at liberty to show, to the satisfaction of this Court, that the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs; this to be made appear by affidavit, on days' notice to the opposite party, or their Counsel in Georgia. Value in dispute proved.

Rule as to affidavits to be mutual.

No. 14.

(AUGUST 12, 1801.)

Ordered, That Counsellors may be admitted as Attorneys in this Court on taking the usual oath. (*See Rule 3.*) Counsel.

No. 15.

(DECEMBER 9, 1801.)

It is ordered, That in every case where the defendant in error fails to appear, the plaintiff may proceed *ex parte*. (*See Rules 19, 30, and 43.*) Defendant in error not appearing.

No. 16.

(FEBRUARY TERM, 1803.)

Writ of Error
issued within
thirty days.

It is ordered, That where the writ of error issues within thirty days before the meeting of the Court, the defendant in error is at liberty to enter his appearance, and proceed to trial; otherwise, the cause must be continued. (*See Rules 19 and 30.*)

No. 17.

(FEBRUARY TERM, 1803.)

Delay, da-
mages for.

In all cases where a writ of error shall delay the proceedings on the judgment of the Circuit Court, and shall appear to have been sued out merely for delay, damages shall be awarded, at the rate of *ten per centum per annum* on the amount of the judgment. (*See Rule 20.*)

No. 18.

(FEBRUARY TERM, 1803.)

Damages for
delay.

In such cases, where there exists a real controversy, the damages shall be only at the rate of *six per centum per annum*. In both cases the interest is to be computed as part of the damages. (*See Rule 20.*)

No. 19.

(FEBRUARY TERM, 1806.)

What causes
for trial.

All causes, the records in which shall be delivered to the Clerk on or before the sixth day

of a term, shall be considered as for trial in the course of that term. Where the record shall be delivered after the sixth day of the term, either party will be entitled to a continuance. In all cases where a writ of error shall be a supersedeas to a judgment rendered in any Circuit Court of the United States, except that for the District of Columbia, at least thirty days previous to the commencement of any term of this court, it shall be the duty of the plaintiff in error to lodge a copy of the record with the Clerk of this Court within the first six days of the term; and if he shall fail so to do, the defendant in error shall be permitted afterwards to lodge a copy of the record with the Clerk, and the cause shall stand for trial in like manner as if the record had come up within the first six days; or he may, on producing a certificate from the clerk, stating the cause, and that a writ of error has been sued out, which operates as a supersedeas to the judgment, have the said writ of error docketed and dismissed. This rule shall apply to all judgments rendered by the Court for the District of Columbia at any time prior to a session of this Court.

Supersedeas.

Plaintiff in error to lodge Record.

Defendant in error to lodge Record.

On certificate to docket and dismiss.

In cases not put to issue at the August term, it shall be the duty of the plaintiff in error, if errors shall not have been assigned in the court below, to assign them in this Court at the commencement of the term, or so soon thereafter as the record shall be filed with the Clerk, and the cause placed on the docket; and if he shall fail so to do, and shall also fail to assign them when

Errors, assignment of.

Costs.

the cause shall be called for trial, the writ of error may be dismissed at his costs; and if the defendant shall refuse to plead to issue, and the cause shall be called for trial, the Court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause; and that where there is no appearance for the plaintiff in error, the defendant may have the plaintiff called, and dismiss the writ of error; or may open the record, and pray for an affirmance. In such a case *costs go of course*. *Montalet vs. Murray*. (*See Rules 15, 30, 43, and 63.*)

No. 20.

(FEBRUARY TERM, 1807.)

Damages.

It is ordered, That where damages are given by the rule passed in February term, 1803, the said damages shall be calculated to the day of the affirmance of the judgment in this Court. (*See Rules 17 and 18.*)

No. 21.

(FEBRUARY TERM, 1808.)

Costs in Supreme Court.

1st. Ordered, That all parties of this Court, not being residents of the United States, shall give security for the costs accruing in this Court, to be entered on the record.

Clerk's record.

2d. Ordered, That upon the Clerk of this Court producing satisfactory evidence, by affidavit, or the acknowledgment of the parties or

their sureties, of having served a copy of the bill of costs due by them respectively, in this Court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively, to compel payment of the said costs. (*See Rule 37.*)

No. 22.

(FEBRUARY TERM, 1810.)

Ordered, That upon the reversal of a judgment or decree of the Circuit Court, the party in whose favor the reversal is shall recover his costs in the Circuit Court. Costs.

No. 23.

(FEBRUARY TERM, 1812.)

It is ordered, That only two Counsel be permitted to argue for each party, plaintiff and defendant, in a cause. Counsel.

No. 24.

(FEBRUARY TERM, 1812.)

There having been two Associate Justices of the Court appointed since its last session, *It is ordered*, That the following allotment be made of the Chief Justice and the Associate Justices of the said Supreme Court, among the circuits agreeably to the Act of Congress in such case made and provided; and that such allotment be entered on record, viz. :

No. 26.

(FEBRUARY TERM, 1817.)

Whenever it shall be necessary or proper, in the opinion of the presiding judge in any Circuit Court, or District Court exercising Circuit Court jurisdiction, that original papers of any kind should be inspected in the Supreme Court, upon appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers, as to him may seem proper; and this Court will receive and consider such original papers in connection with the transcript of the proceedings.

Original
papers, to go
up, when.

No. 27.

(FEBRUARY TERM, 1817.)

In all cases of admiralty and maritime jurisdiction where new evidence shall be admissible in this Court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this Court, or from any Circuit Court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: *Provided, however,* that nothing in this rule shall prevent any party from giving oral testimony in open

New evidence.

court in cases where, by law, it is admissible.
(*See Rule 25.*)

No. 28.

(FEBRUARY TERM, 1821.)

Death of Parties

Whenever, pending a writ of error or appeal in this Court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order, that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the same reversed if it be erroneous: *Provided, however,* that a copy of every such order shall be printed in some newspaper at the seat of Government in which the laws of the United States shall be printed by authority, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

No. 29.

(FEBRUARY TERM, 1821.)

Ordered, After the present term no cause Briefs. standing for argument will be heard by the Court until the parties shall have furnished the court with a printed brief or abstract of the cause, containing the substance of all the material pleadings, facts, and documents on which the parties rely, and the points of law and fact intended to be presented at the argument. (*See Rules* 8, 53, and 57.)

No. 30.

(FEBRUARY TERM, 1821.)

In all cases where a writ of error or an appeal Entry. shall be brought to this Court from any judgment Docket and or decree rendered thirty days before the term dismiss. to which such writ of error or appeal shall be returnable, it shall be the duty of the plaintiff in error, or appellant, as the case may be, to docket the cause, and file the record thereof with the Clerk of this Court within the first six days of the term; on failure to do which, the defendant in error, or appellee, as the case may be, may docket the cause, and file a copy of the record with the Clerk, and thereupon the cause shall stand for trial in like manner as if the record had been duly filed within the first six days of the term; or at his option he may have the cause docketed and dismissed, upon producing a certificate from the Clerk of the Court wherein

the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal had been duly sued out and allowed. (*See Rules 15, 19, 43, and 63.*)

No. 31.

(FEBRUARY TERM, 1823.)

Record must
be complete.

No cause will hereafter be heard until a complete record, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this Court, shall be filed. (*See Rule 11.*)

No. 32.

(FEBRUARY TERM, 1824.)

Certiorari.

No certiorari for diminution of the record shall be hereafter awarded in any cause, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari shall be made at the first term of the entry of the cause; otherwise, the same shall not be granted, unless upon special cause shown to the Court, accounting satisfactorily for the delay.

No. 33.

(FEBRUARY TERM, 1824.)

Objections to
Evidence.

In all cases of equity and admiralty jurisdiction heard in this Court, no objection shall here-

after be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the Court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

No. 34.

(FEBRUARY TERM, 1824.)

[RESCINDED.]—On Saturday of each week during the sitting of the Court, motions in cases not required by the rules of the Court to be put upon the docket shall be entitled to preference, if such motions shall be made before the Court shall have entered upon the hearing of a cause upon the docket. (*See Rule 50.*)

No. 35.

(FEBRUARY TERM, 1825.)

Ordered, That after the present term no original record shall be taken from the Supreme Court room, or from the office of the Clerk of this Court. (*See Rule 12.*)

Record not to
be taken from
Clerk's office.

No. 36.

(JANUARY TERM, 1830.)

The Court, on the second day in each term hereafter, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during

Call of docket.

the term, in the same order ; and if the parties, or either of them, shall be ready when the case is called, the same will be heard ; and if neither party shall be ready to proceed in the argument, the cause shall go down to the foot of the docket unless some good and satisfactory reason to the contrary shall be shown to the Court. That ten causes only shall be considered as liable to be called on each day during the term, including the one under argument, if the same shall not be concluded on the preceding day. No cause shall be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the Court. Every cause which shall have been twice called in its order, and passed, and put at the foot of the docket, shall, if not again reached during the term it was called be continued to the next term of the Court.

No. 37.

(JANUARY TERM, 1831.)

Costs to clerk.

1. In all cases the Clerk shall take of the plaintiff a bond with a competent security, to respond to costs, in the penalty of two hundred dollars ; or a deposit of that amount to be placed in bank subject to his draft.

Record printed.

2. In all cases the Clerk shall have fifteen copies of the records printed for the Court, provided the Government will admit the item in the expenses of the Court.

Cost of record.

3. In all cases the Clerk shall deliver a copy

of the printed record to each party. And in cases of dismissal (except for want of jurisdiction) or affirmance, one copy of the record shall be taxed against the plaintiff, which charge includes the charge for the copy furnished him.

In case of reversal and dismissal for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy. (*See Rules 21 and 45.*)

No. 38.

(JANUARY TERM, 1832.)

It is ordered by the Court, That hereafter, the Exceptions. Judges of the Circuit and District Courts do not allow any bill of exceptions, which shall contain the charge of the Court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But that the party excepting be required to state distinctly the several matters of law in such charge to which he excepts; and that such matters of law, and those only, be inserted in the bill of exceptions, and allowed by the Court.

No. 39.

(JANUARY TERM, 1833.)

1. *It is ordered by the Court,* That during the Library. session of the Court, any gentleman of the bar having a cause on the docket, and wishing to use any book or books in the Law Library, shall be at liberty, upon application to the Clerk of the Court, to receive an order to take the same (not

exceeding at any one time three) from the Library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the Clerk. And it shall be the duty of the Clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for, and forfeit and pay twice the value thereof; as also one dollar per day for each day's detention beyond the limited time.

2. *It is ordered by the Court,* That during the session of the Court, any Judge thereof may take from the Law Library any book or books he may think proper, he being responsible for the due return thereof.

No. 40.

(JANUARY TERM, 1833.)

Printed arguments.

Whereas, It has been represented to the Court, that it would in many cases accommodate Counsel, and save expense to parties, to submit causes upon printed arguments. It is therefore

Ordered, That in all cases brought here on appeal, writ of error, or otherwise, the Court will receive printed arguments, if the counsel on either or both sides shall choose so to submit the same. (*See Rules 44 and 51.*)

No. 41.

(JANUARY TERM, 1834.)

Ordered. That the original opinions of the Court, delivered to the reporter, be filed in the office of the Clerk of the Court for preservation as soon as the volume of Reports for the term, at which they are delivered, shall be published. Opinions.

No. 42.

(JANUARY TERM, 1835.)

All the opinions delivered by the Court since the commencement of the term shall be forthwith delivered over to the Clerk to be recorded. Opinions.

And all opinions hereafter delivered by the Court shall immediately, upon the delivery thereof, be in like manner delivered over to the Clerk to be recorded. And it shall be the duty of the Clerk to cause the same to be forthwith recorded, and to deliver the originals with a transcript of the judgment or decree of the Court thereon to the reporter, as soon as the same shall be recorded.

And all the opinions of the Court, as far as practicable, be recorded during the term, so that the publication of the reports may not be delayed thereby.

No. 43.

(JANUARY TERM, 1835.)

1. In all cases where a writ of error, or an appeal, shall be brought to this Court from any Writs of error, &c., thirty days.

Docket and dis-
miss.

judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error, or appellant, as the case may be, to docket the cause and file the record thereof with the Clerk of this Court within the first six days of the term. If he shall fail so to do, the defendant in error, or appellee, as the case may be, may docket the cause and file a copy of the record with the Clerk, in which case it shall stand for argument at the term; or at his option he may have the cause docketed and dismissed upon producing a certificate from the Clerk of the Court, wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal had been duly sued out and allowed.

2. No writ of error or appeal shall be docketed, or the record of the cause filed by the plaintiff in error, or appellant, after the first six days of the term, except upon the terms that the cause shall stand for argument during the term, or be continued at the option of the defendant in error, or appellee. But in no case shall the plaintiff in error, or appellant, be entitled to docket the cause and file the record, after the same shall have been docketed and dismissed in the manner provided for in the preceding rule, unless by order of the Court, or with the consent of the opposite party.

3. In cases where the cause shall not be docketed and the record filed with the Clerk by either party until after thirty days from the commencement of the term, the cause shall stand

continued until the next term. (*See Rules 15, 19, 30, and 63.*)

No. 44.

(JANUARY TERM, 1837.)

When a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by Counsel. (*See Rules 40 and 51.*)

Printed argument.

No. 45.

(JANUARY TERM, 1838.)

In all cases where any suit shall be dismissed in this Court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed for the defendant in error, or appellee, as the case may be, unless otherwise agreed by the parties.

Dismission: costs.

In all cases of affirmance of any judgment or decree in this Court, costs shall be allowed to the defendant in error or appellee, as the case may be, unless otherwise ordered by the Court.

Costs in affirmance.

In all cases of reversals of any judgment or decree in this Court, except where the reversal shall be for want of jurisdiction, costs shall be allowed in this Court, for the plaintiff in error or appellant, as the case may be, unless otherwise ordered by the Court.

Costs in reversal.

Neither of the foregoing rules shall apply to cases where the United States are a party: but in such cases no costs shall be allowed in this Court for or against the United States.

U. S., no costs for or against.

In all cases of the dismissal of any suit in this

Mandate.

Court, it shall be the duty of the Clerk to issue a mandate, or other proper process, in the nature of a procedendo, to the Court below, for the purpose of informing such Court of the proceedings in this Court, so that further proceedings may be had in such Court as to law and justice may appertain.

Costs in mandate.

When costs are allowed in this Court, it shall be the duty of the Clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the Court below, and annex to the same the bill of items taxed in detail. (*See Rules 21 and 37.*)

No. 46.

(JANUARY TERM, 1838.)

Motions in writing.

All motions hereafter made to the Court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

No. 47.

(JANUARY TERM, 1838.)

Adjournment.

The Court will, at every future session, announce on what day it will adjourn at least ten days before the time which shall be fixed upon; and the Court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

No. 48.

(JANUARY TERM, 1841.)

Ordered, That the Clerk take charge of the Library. books of the Court, together with such of the duplicate law books as Congress may direct to be transferred to the Court, and arrange them in the Conference room, which he shall have fitted up in a proper manner; and that he do not permit such books to be taken therefrom, by any one, except the Judges of the Court.

No. 49.

(JANUARY TERM, 1842.)

[RESCINDED.] — *Ordered*, That printed argu- Printed argu-
ments. ments will not be received under the fortieth Rule of the Court, unless filed within forty days from the commencement of the Term, except in cases which are reached in the regular call of the docket. (*See Rule 52.*)

No. 50.

(DECEMBER TERM, 1844.)

Ordered, That the Court will not hear argu- No Court on
Saturday. ments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the Court; and that on Friday in each week, during the sitting Motions on Fri-
day. of the Court, motions in cases not required by the Rules of the Court to be put on the docket shall be entitled to preference, if such motions shall be made before the Court shall have entered

on the hearing of a cause upon the docket: and the Rule No. 34, adopted at February Term, 1824, be, and the same is hereby, rescinded.

No. 51.

(DECEMBER TERM, 1844.)

Printed argu-
ments.

Ordered, That no printed or written argument be hereafter received, unless the same shall be signed by an Attorney or Counsellor of this Court.

No. 52.

(DECEMBER TERM, 1844.)

Printed argu-
ments.

[RESCINDED.]—*Ordered*, That printed arguments, under the fortieth rule, will be received hereafter, and at the present Term, until the first Monday in February in each and every Term, while the Supreme Court continues to meet on the first Monday in December; and that the forty-ninth rule of the Court, adopted at January Term, 1842, be, and the same is hereby, rescinded. (*See Rule 56.*)

No. 53.

(DECEMBER TERM, 1848.)

Two hours for
counsel.

Ordered, That no Counsel will be permitted to speak in the argument of any case in this Court more than two hours, without the special leave of the Court granted before the argument begins.

Printed.

Counsel will not be heard, unless a printed

abstract of the case be first filed, together with the points intended to be made, and the authorities intended to be cited in support of them arranged under the respective points; and no other book or case be referred to in the argument.

If one of the parties omits to file such a statement, he cannot be heard, and the case will be heard *ex parte* upon the argument of the party by whom the statement is filed.

This rule to take effect on the first day of December Term, 1849. (*See Rules 8, 29, and 57.*)

No. 54.

(DECEMBER TERM, 1849.)

Ordered, That when an appearance is not entered on the record for either the plaintiff or defendant on or before the second day of the term next succeeding that on which the case is docketed, it shall be dismissed at the costs of the plaintiff. (*See Rule 59.*)

Appearance.
Dismissal.

No. 55.

(DECEMBER TERM, 1849.)

When a case is called for argument at two successive Terms, and upon the call at the second Term neither party is prepared to argue it, it shall be dismissed at the costs of the plaintiff, unless sufficient cause is shown for further postponement.

Two calls for
argument.

No. 56.

(DECEMBER TERM, 1849.)

Ordered, That printed arguments, under the fortieth rule, shall not hereafter be received, unless filed within the first ten days of the Term.

No. 57.

(DECEMBER TERM, 1849.)

Ordered, That twelve printed copies of the abstract, points, and authorities required by the 53d Rule, be filed with the Clerk three days before the case is called for argument; nine of these copies for the Court, one for the Reporter, one for the opposing counsel, and the remaining one to be retained by the Clerk. This order to take effect on the first day of May next. (*See Rules 8, 29, and 53.*)

No. 58.

(DECEMBER TERM, 1850.)

Ordered, That when a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument will be received unless it is filed before the oral argument begins, and the Court will proceed to consider and decide the case upon the ex parte argument.

No. 59.

(DECEMBER TERM, 1851.)

Ordered, That when a case is reached in the regular call of the docket, and no appearance is entered for either party, the case shall be dismissed at the costs of the plaintiff; and the 54th Rule, adopted at December term, 1849, be and the same is hereby rescinded.

No. 60.

(DECEMBER TERM, 1851.)

Ordered, That whenever any record, transmitted to this Court upon a writ of error or appeal, shall contain any document, paper, testimony, or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding made under the authority of the inferior court, or admitted to be correct, the record shall not be printed, but the case shall be reported to this Court by the Clerk, and the Court, will thereupon remand it to the inferior Court in order that a translation may be there supplied and inserted in the record.

No. 61.

(DECEMBER TERM, 1851.)

When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next suc-

ceeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

This rule shall apply to cases now on the docket, as well as to cases hereafter brought. And those now on the docket and falling within the rule, shall abate on the tenth day of December Term, 1852, unless upon special cause shown the Court shall direct otherwise.

No. 62.

(DECEMBER TERM, 1851.)

Interest on
judgments, &c.

In cases where a writ of error is prosecuted to the Supreme Court, and the judgment of the inferior Court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

The same rule shall be applied to decrees for the payment of money in cases in Chancery, unless otherwise ordered by this Court.

This rule to take effect on the first day of December Term, 1852.

No. 63.

(DECEMBER TERM, 1853.)

Entry.

First. In all cases where a writ of error or an appeal shall be brought to this Court from any judgment or decree, rendered thirty days before

the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause, and file the record thereof with the Clerk of this Court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause, and file the record thereof with the Clerk of this Court within the first thirty days of the term; and, if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate from the Clerk of the Court wherein the judgment or decree was rendered, stating the cause and certifying that such writ of error or appeal has been duly sued out and allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the same shall have been docketed and dismissed under the rule, unless by order of the Court or the consent of the opposite party.

Docketing and
dismissing.

Second. But the defendant in error or appellee may at his option docket the case and file a copy of the record with the Clerk of this Court; and if the case is docketed and a copy of the record filed with the Clerk of this Court by either party within the periods of time above limited and described by this rule the case shall stand for argument at the term.

Third. In all cases where the period of thirty days is mentioned in this rule it shall be extended to sixty days in writs of error and appeals from California, Oregon, Washington, New Mexico, and Utah.—*May 2, 1854.* (*See Rules 19, 30, 43.*)

II.

FORMS OF WRITS OF ERROR AND APPEALS.

WRIT OF ERROR.

United States of America, *ss.* The President of the United States. To the Judges of the Circuit Court holden in and for the District of Massachusetts (or to the Judges of the Supreme Court of the State of) Greeting.

Because that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between

Plaintiff and

Defendant , in a plea of (or, "in a suit in Equity," if it be a suit in equity in a state court) a manifest error has intervened to the great damage of the said

as in complaint has been stated. And as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that, if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and the associate Justices of the Supreme Court of the United

States, on the first Monday of December next, at Washington, being the present seat of the national government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness, the Honorable Esquire,
Chief Justice of the said Supreme Court, at
Washington, aforesaid, this day of
in the year of our Lord one
thousand eight hundred and and of
the Independence of the United States the

Clerk.

CITATION ON A WRIT OF ERROR.

[*Mutatis mutandis*, the same Citation may be used in an appeal.]

United States of America, *ss.*

To Greeting: you are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the Monday in
* next, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the District of ,
(or the Supreme Court of the State of ,)
wherein is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable _____ Chief
 Justice (or, *one of the Justices*) of the said Su-
 preme Court (or, *one of the Judges of the Circuit*
Court of the United States for the District of
 _____) this _____ day of _____,
 in the year of our Lord, 18 _____
 Chief Justice, or Justice, &c.

BOND TO BE EXECUTED AND FILED BY THE
 PLAINTIFF IN ERROR.

[*Mutatis mutandis*, the same Bond may be filed by an ap-
 pellant in Equity or Admiralty.]

Circuit Court of the United States for the
 Circuit and District of _____

Know all men by these presents; That we, &c.,
 are held and firmly bound unto (*the defendant*
in error) in the sum of _____ dollars, to
 be paid to the said _____ his executors
 and administrators. To which payment, well
 and truly to be made, we bind ourselves and
 each of us, jointly and severally, and each of our
 heirs, executors, and administrators, firmly by
 these presents. Sealed with our seals, and
 dated, &c.,
 The condition of this obligation is such, that
 whereas the said (*the defendant in error*) has re-
 covered a judgment in the Circuit Court of the
 United States, &c., against the said (*the plaintiff in*
error) for the sum of _____*, which said
 judgment was rendered on, &c., and whereas the

* Here give the damages and costs in the judgment below.

said (*the plaintiff in error*), in order to obtain a reversal of the same, hath sued out a writ of error to the Supreme Court of the United States. Now therefore, if the above named (*the plaintiff in error*) shall prosecute his said writ of error to effect and shall answer all damages and costs and pay the said judgment, if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

Executed and delivered
in presence of

L. S.

L. S.

L. S.

APPEALS IN EQUITY OR ADMIRALTY.

CLAIM AND ALLOWANCE OF AN APPEAL, WHEN
THE MATTER IN DISPUTE EXCEEDS THE VALUE OF
\$2000.

Circuit Court of the United States, &c.
Term 185

A. B. in Equity, vs. C. D.

And now the above named defendant, after a final decree entered in this cause, comes and shows to the Court that the matter in dispute exceeds the sum of \$2000, and thereupon claims an appeal from the said final decree to the

Supreme Court of the United States next to be holden at Washington, on, &c.; and the same is accordingly allowed (and the appellant is ordered to serve the usual citation, according to law.)*

By the Court,

Clerk.

CLAIM AND ALLOWANCE OF AN APPEAL IN PATENT CAUSES WHERE THE MATTER IN DISPUTE IS LESS THAN THE VALUE OF \$2000.

Circuit Court of the United States, &c.
Term 185

A. B. in Equity vs. C. D.

And now the defendant, after a final decree entered in this cause, comes and shows to the Court that notwithstanding the amount in controversy in this cause is less than the value of \$2000, yet that the said final decree involves the construction of the Acts of Congress concerning Patents for Useful Inventions, or some of them; and it appearing to the Court that it is reasonable to allow an appeal in this cause,

* This clause should be added, where the appeal is not taken at the same term when the decree was rendered.

the same is hereby allowed (*and the appellant is ordered to serve the usual citation, according to law.*)*

By the Court,

Clerk.

* See note, *ante*, p. 607.

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